Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

CRAIG SCOTT DOUGALL, *et al.*,

Petitioners,

v.

THE RECTOR AND VISITORS OF
GEORGE MASON UNIVERSITY
and
THE COMMONWEALTH OF VIRGINIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the aftermath of this Court's decision in *Alden v. Maine*, can the Commonwealth of Virginia, which does not have immunity for its contracts with its employees, deny the Petitioners due process of law by taking Petitioners' wages?

2. Are the rights afforded an employee under the Fair Labor Standards Act contract rights?

3. Can Virginia violate the Supremacy Clause by removing state court jurisdiction granted by Congress in the Fair Labor Standards Act?

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STATEMENT OF JURISDICTION

Petitioners seek review of the Supreme Court of Virginia's denial of discretionary review of Petitioners' Petition for Appeal, dated June 5, 2000. Jurisdiction in this Court is vested by reason of Article III, U.S. Constitution, Amendment XIV, U.S. Constitution, 28 U.S.C. §§2102(b), 2104, and Rule 13.1 of the Rules of the Supreme Court of the United States, as this Petitioner requests review of a final order from the highest court of a state, the Supreme Court of the Commonwealth of Virginia, and involves a federal question: whether the Commonwealth of Virginia, by its agency, denied Petitioners their United States Constitutional guarantee of due process prior to any taking of their property.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI, U.S. Constitution:

* * *

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

* * *

Amendment XIV, U.S. Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

29 U.S.C. §216(b):

(b) **Damages; right of action; attorney's fees and costs; termination of right of action.** Any employer who violates the provisions of section 6 or section 7 of this Act [29 USCS §§206 or 207] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 15(a)(3) of this Act [29 USCS §215(a)-(3)] shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3) [20 USCS §215(a)(3)], including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in

the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 [29 USCS §217] in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act [29 USCS §§206 or 207] by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3) [29 USCS §215(a)(3)].

Code §2.1-116.06 of the Code of Virginia (1950), as amended:

§§2.1-116.06. Grievances qualifying for a grievance hearing; grievance hearing generally

* * *

C. Complaints relating solely to the following issues are not grievable and shall not proceed to a hearing: (i) establishment and revision of wages, salaries, position classifications, or general benefits; (ii) work activity accepted by the employee as a condition of employment or which may reasonably be expected to be a part of the job content; (iii) contents of ordinances, statutes or established personnel policies, procedures, and rules and regulations; (iv) methods, means, and

personnel by which work activities are to be carried on; (v) termination, layoff, demotion, or suspension from duties because of lack of work, reduction in work force, or job abolition; (vi) hiring, promotion, transfer, assignment, and retention of employees within the agency; and (vii) relief of employees from duties of the agency in emergencies.

(Amended in 1996 to delete "are not grievable and" after "the following issues".)

STATEMENT OF THE CASE

Petitioners seek a writ of certiorari for redress of their state employer's denial of due process in their claim for unpaid contractual wages. After *Alden v. Maine*, employees deprived of wages claims, including wages owing through the Fair Labor Standards Act (hereinafter "FLSA"), could sue their state employer only if the state is not immune or the state waived immunity. *Alden v. Maine* did not relieve states of their obligations under the Fair Labor Standards Act, did not render the states immune from suits by the federal government and did not attempt to decide whether states are immune from suits by its employees. Immunity from suits by employees was left as a matter of state law. Virginia, by its well-established case law, statutory enactment and the rule of this case, is not immune from contract actions by its employees for unpaid wages. In this case, however, Virginia also argues that its employees' claims are the exclusive subject of state personnel procedures, which Petitioners say are unconstitutional.

This is a consolidated[1] appeal from the Supreme Court of Virginia's denial of a Petition for Writ of Appeal to the

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[1]The cases consolidated are *Dougall v. George Mason University*, Law No. 178905, *Foster v. George Mason University*, Law

[footnote continued]

Circuit Court for the County of Fairfax. Petitioners are current and former police officers and dispatchers for George Mason University in its campus police department. Their causes of action arise from intentional violations of Respondents' agreement to compensate Petitioners all hourly compensation due them, both at their normal hourly rate and, when applicable, their overtime hourly rate.[2] In addition, Petitioners sought additional unpaid compensation for "moonlighting", where Respondents failed to compensate Petitioners money collected for work Petitioners performed for outside vendors.

The cases involve two (2) material proceedings based on original Motions for Judgment that contained four (4) counts, styled in the nature of contract claims with additional counts for violations of the Fair Labor Standards Act (Counts III and IV). The Petitioners primarily sought money damages for earned but unpaid pay and overtime pay. The first material proceeding was a hearing on August 26, 1999, when the court below granted a plea of sovereign immunity in favor of Respondents concern-

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No. 178906, *Allan-Logan v. George Mason University*, Law No. 178907, *Rodriguez v. George Mason University*, Law No. 178908. The Supreme Court of Virginia identified these cases by Record Number 000496. Identical issues were disposed simultaneously in the Circuit Court on the same days. While the court below issued no formal order consolidating the cases, at all times relevant to the issues presented to this Court, the issues were argued and decided together. Pursuant to 12.4 of the Rules of the Supreme Court of the United States, a single Petition for Certiorari is submitted.

[2] In their initial and amended complaints, the Petitioners alleged their damages in excess of $15,000, which is within the exclusive and original jurisdictional limit of circuit courts in Virginia. *See* §16.1-77(1) and §17.1-513 of the Code of Virginia (1950), as amended.

ing the Fair Labor Standards Act counts,[3] and sustained demurrers to claims of attorney's fees, interest, and punitive damages. The Petitioners amended their Motions for Judgment to the extent permitted by the trial court, which left only the cases styled in the nature of contract claims. The second proceeding was a hearing on December 9, 1999, when the court below overruled Respondent's demurrers that Petitioners had failed to allege contract actions and failed to comply with Virginia's contract claim statute. In addition, the trial court denied Respondents' plea of sovereign immunity as to those contract claims. However, the trial court sustained Respondents' demurrer that Virginia's personnel laws were the exclusive remedy for Petitioners.

The result of the trial court's action was to rule that while the Petitioners have properly alleged a breach of contract claim against the Petitioners for which Virginia is not immune, Virginia's personnel laws preclude any right to have any judicial review concerning those breaches. This left Petitioners without any remedy. The Petitioners used what personnel law procedure was available – a protest to their supervisors who denied the claim without any hearing and a denial by Respondents' administrators of those contract claims. At no time were Petitioners offered an unbiased tribunal to adjudicate their claims, nor was there any notice of the Respondents' proposed action or any grounds for that action, nor any

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[3] This ruling was based on this Court's holding in *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999).

opportunity to present reasons and witnesses why that action should not be taken, nor any right to have counsel in those proceedings, no record was ever made of those proceedings, no statements were ever made stating the reason for those decisions, and there was never any judicial review of those decisions. All these were barred by the trial court's interpretation of Virginia's personnel law. As a factual matter, Respondents have taken Petitioners' money and labor without paying for it.

ARGUMENT

The court below determined that while there is no sovereign immunity for the contract claims, those claims were nonetheless precluded from judicial review in Virginia courts because of the Virginia Personnel Act.[4] Assuming the Virginia Personnel Act is the only state remedy, that remedy is unconstitutional because it fails to afford the Petitioners the minimum due process guaranteed them by Amendment XIV of the United States Constitution. The Virginia Personnel Act only provides Petitioners a complaint to supervisors but explicitly bars any hearing on Petitioners' unpaid wage claims. When the court below ruled that this Act was the exclusive remedy for the Police Officers' claims, the effective ruling was that there was no judicial review available since Virginia's circuit courts lack jurisdiction to hear the Police Officers' claims. The University is unjustly enriched without judicial review of its conduct, and the

[4]Hereinafter, the "VPA." The court below did not decide whether the FLSA remedies were precluded by the VPA since those counts were dismissed solely based on immunity. Virginia state courts are the only forum available to the Police Officers since they cannot seek redress in federal courts. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

University has taken the property of the Police Officers without due process of law.[5]

The Police Officers seek judicial review of their contract claims. The University attacked the Police Officers' claims by interposing a demurrer arguing that the VPA is an exclusive remedy. In reply to that demurrer, the Police Officers asserted that the University's position would impose an unconstitutional taking without due process of law. The Police Officers' claims are not a direct action for taking without due process, but of breach of contract, claims considered well-pled by the court below. Appendices B through F, and G. Thus, the issue of constitutional taking without due process is not raised by direct claim; rather, the issue is raised as a reply to the demurrer raised by the University.[6]

There is no clearly established bar in the personnel laws to constitutional claims. *Johnson v. Robison,* 415 U.S. 361, 367, 94 S.Ct. 1160, 1165, 39 L.Ed.2d 389 (1974). "Serious constitutional questions" arise when an act is construed to bar judicial review of constitutional claims. *Johnson v. Robison,* 415 U.S. 361, 366-367, 94 S.Ct. 1160, 1165-1166, 39 L.Ed.2d 389 (1974). The only dismissal is when the constitutional claim is "essentially fictitious", "obviously frivolous" and "obviously without merit". *Hagans v. Levine,* 415 U.S. 528, 537, 94 S.Ct. 1372, 1379, 39 L.Ed.2d 577 (1974); *Buchanen v. City of Chesapeake,* 237 Va. 50, 53, 375 S.E.2d 736 (1989) (Apparently applying this standard). There is no doubt that the Police Officers' claims have merit, due to the amount sought and because their cause of action

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[5]This argument was raised in the court below as to the exclusivity of the VPA.

[6]As a reply, the issue is not one to be raised by amendment to the Motions for Judgment.

is well-pled. Even if a statute such as the VPA could preclude ordinary review, such preclusion must give way when constitutional issues are involved. *Webster v. Doe*, 486 U.S. 592, 603, 108 S.Ct. 2047, 2053 (1988); *Bowen v. Michigan Academy of Family*, 476 U.S. 667, 670-673, 106 S.Ct. 2133, 2135-2137 (1986). In the past, these issues were raised through the defense of precluded judicial review. *Webster, supra* at 2050; *Bowen, supra* at 2135, and not as a part of the complainant's case. *See also City of Amarillo v. Hancock*, 150 Tex. 231, 239 S.W.2d 788, 790 (1951) (City personnel ordinance which barred judicial review does not bar such review when constitutional issues involved).

In summary, Virginia cannot deny judicial review of the Police Officers' contract claims. To do so permits the Commonwealth's agency to take labor without compensation.

I.

THE PETITIONERS' CONSTITUTIONALLY PROTECTED PROPERTY RIGHTS WERE TAKEN WITHOUT COMPENSATION AND IN VIOLATION OF DUE PROCESS.

A. By Well-Established Rules, Virginia is Not Immune From Its Personnel Contracts.

The trial court ruled that there is no sovereign immunity for contracts Virginia enters into with its employees. App. G, p. 66a. ("The plea in bar, paragraph five, regarding the immunity of the commonwealth, the plea is overruled because the Commonwealth is not immune from suit in contract. . .") This ruling is the rule of the case, but is well-supported by Virginia case decisions and statutory enactment.[7]

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[7]The Commonwealth never excepted from the trial court's ruling on this issue.

Section 8.01-192 of the Code of Virginia (1950), as amended, provides for Virginia's general consent to suit in contract. This enactment codifies Virginia's long established acceptance of suit by its citizens. The Supreme Court stated that "since 1778, the 'cherished policy of Virginia' to allow to citizens 'the largest liberty of suit against herself' in contract cases." *Wiecking v. Allied Medical Supply Corp.*, 239 Va. 548, 552-3, 391 S.E.2d 258 (1990) (Citing *Higginbotham's ex'x v. The Commonwealth*, 66 Va. (25 Gratt.) 627, 638 (1874)). In *Wiecking, supra*, the Virginia Supreme Court stated:

> [While the] doctrine is "alive and well" in Virginia, as a defense to actions in tort, *Messina v. Burden*, 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984), but we have never extended that defense to actions based on contracts entered into by duly authorized agents of the government.

239 Va. at 551, 391 S.E.2d at 260. The reasons were:

> when the state contracts for goods or services, receives the benefit of the contract, and then refuses to honor its obligations, the contractor's property is subjected to an unconstitutional taking without just compensation, . . . a denial of liability under such circumstances also violates state and federal due-process guarantees, . . . to hold a state may enter into a valid contract and yet retain the power to avoid its obligations would entail an obvious contradiction; neither the state nor the contractor can be bound, yet not bound, by a single contract, . . . the courts will not permit the government to exercise "bad faith and shoddy dealing," . . . and relegating the injured party to an appeal for justice to the legislature in the form of a private bill of relief is to offer a "doubtful remedy" . . .

239 Va. at 551-552, 391 S.E.2d at 260 (citations omitted). Simply stated, immunity is not relevant to Petitioner's contractual claims. Rather, the rationale – that there is otherwise an unconstitutional taking – underpins the lack of immunity in actions *ex contractu* against the Commonwealth and that rationale and specific allegation of a taking is not required.

B. *Alden* Does Not Grant Virginia Immunity.

The Supreme Court of the United States did not create for the Commonwealth of Virginia sovereign immunity when *Alden* was decided. The *Alden* decision assumed Maine and all states were immune and decided if that immunity could be abrogated by the Fair Labor Standards Act. It stated:

> The Eleventh Amendment makes explicit reference to the States' immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., Amdt. 11. We have, as a result, sometimes referred to the States' immunity from suit as "Eleventh Amendment Immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today* * * *

Alden, 527 U.S. 706, 119 S.Ct. 2240, 2246-7, 144 L.Ed.2d 636 (1999). As is demonstrated by cases such

as *Wiecking, supra,* Virginia never had immunity for suits in contract and does not retain any immunity for such suits today.

Alden v. Maine, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) holds "the States ***retain*** immunity from private suits in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation." *Id.* 119 S.Ct. at 2267 (emphasis added). The *Alden* decision then discussed "the central reason given by the founders who chose to ***preserve*** the States' sovereign immunity." *Id.* (emphasis added). It assumed state immunity and only inquired as to whether the State of Maine waived immunity or consented to suit.[8] *Id.* at 2246-7, 2268. Rather it inquired as to the issues raised in that appeal: 1) if the appellants had a right to sue because the FLSA was the "supreme Law of the land" and, 2) "states cannot choose to discriminate among litigants on the basis that federal law furnishes their underlying right". Brief for Petitioners, *Alden v. Maine,* No. 98-436 at 3-5 (January 7, 1999). The United States Supreme Court's decision was only as to those arguments and it stated "Petitioners have not attempted to establish a waiver of immunity under this standard [consent to suit]" *Alden,* 119 S.Ct. at 2268. The Commonwealth herein cannot establish immunity because no such immunity exists for contractual claims in Virginia and the Commonwealth long ago agreed to suits *ex contractu.*

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[8]Similarly, the United States Supreme Court, in *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), assumed Florida's sovereign immunity because Florida is "nonconsenting".

C. The Virginia Personnel Act Provides Petitioners No Constitutionally Adequate Remedy.

The Virginia Personnel Act does not provide for a grievance, judicial review, unbiased administrative review, or any remedy at all. Rather, it establishes a merit personnel system for state employees and sets a policy of "objective methods of appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment." §2.1-110 of the Code of Virginia (1950), as amended [hereinafter "Code"], and it authorizes the Governor to establish, administer and amend a uniform compensation plan and to provide rules to govern *minimum* hours of work, but gives no remedy if he does not. The VPA only provides a basis to interpret Title 2.1, Chapter 10.01, 2.1-116.01 *et seq.*, Code of Virginia (1950), as amended, "The Department of Employee Relations Counselors" [hereinafter "DERC"] and Title 2.1, Chapter 10, §2.1-114.3, Code of Virginia (1950), as amended, "Department of Personnel and Training" [hereinafter "DPT"] statutes, but the VPA has nothing to do with remedies or exclusivity of the DERC grievance process or DPT policy[9] and/or review of its policy.

The remedy for a discharged state employee is the grievance procedure found in DERC. However, not

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[9]The VPA established the Department of Personnel and Training and it was created to set policy. However, the Director of the DPT "shall have no authority with respect to the state grievance procedures." Code §2.1-114.5.13. DPT establishes the policies which implement the purposes of the VPA – the "objective methods", Code §2.1-110 – and those policies are subject to limited judicial review. *Murray v. Stokes*, 237 Va. 653, 657, 378, S.E.2d 834 (1989). The exclusivity, or limited review of DPT policy, has nothing to do with the Police Officer's contract claims and no remedy is sought for DPT policy. No DPT policy is challenged by the Police Officers in these cases.

every issues, including the ones in these cases, are subjects of the state grievance procedure. As the Commonwealth conceded, "If this was solely about wages, it would appear not to be grievable." App. G, p. 58a. Only those complaints listed in Code §2.1-116.06.A are subject to a grievance. As to all others, "Management reserves the exclusive right to affairs and questions of state government." Code §2.1-116.06.B. Code §2.1-116.06.C. states, "Complaints relating solely to the following issues are not grievable and shall not proceed to a hearing:[10] (i) establishment and revision of wages, salaries, position classifications and general benefits; (ii) work activity accepted by the employee as a condition of employment or which may reasonably be expected to be part of the job content * * *". The disputes in this case do not relate to the establishment and revision of overtime wages, other wages and general benefits. Rather, Petitioners accept the wage scale set for them and there is no issue of revising that pay scale. Nothing in Petitioners' pleadings questions the establishment or revision of wages. Rather, the issues are only the University's failure to pay those wages.[11] The University asserts that the Petitioners must grieve these disputes, but under this generally applicable law they cannot because it is not the subject matter of the Police Officers' dispute and is not grievable. *See* Code §2.1-116.06.C.

The Police Officers used what grievance process was made available to them – an informal grievance process.

---

[10] A 1996 amendment changed this sentence to "Complaints relating solely to the following issues shall not proceed to a hearing * * *".

[11] The University argued below that the dispute is defining "work" under the University policies. However, the University offered no DPT policy which defines work.

Code §2.1-116.05.A & B. However, the informal process ends because there is no right to a hearing. Code §2.1-116.06.C.

The VPA, DERC and DPT were passed by the Virginia legislature to address the due process property rights in state employment – that is, the state employment is a vested or property right which cannot be taken without due process. *See, e.g., Mandel v. Allen,* 81 F.3d 478, 481 (4th Cir. 1996), *Garraghty v. Com. of Va., Dept. of Corrections,* 52 F.3d 1274, 1281 (4th Cir. 1995), *Detweiler v. Com. of Va. Dept. of Rehab. Sys.,* 705 F.2d 557, 558-9 (1983). It was the protection of this additional constitutional guarantee that motivated the passage of these acts. These acts' minimal rights to hearing and opportunity to be heard are intended to provide that protection. These acts were not intended to take away common law contract rights of employees and supplant them with other rights. The trial court's interpretation that the VPA is the exclusive remedy ignores the fact that the VPA's remedies fail to provide those minimal rights when employee property is taken. Because the VPA does not meet the basic requirements of due process, it is unconstitutional.

D. The Compensation Due Petitioners is a Protected Property Interest.

In order to fall under the protections afforded by the Due Process clause of Amendment XIV of the United States Constitution, there must be a protected interest rather than a mere expectancy. "Certainly all of the traditional forms of real and personal property fall within this definition [of property]." Rotunda, Ronald D. and Nowak, John E., *Treatise on Constitutional Law,* Vol. 3, §17.5. Despite Respondents' argument that "I don't

think that in Virginia there is a property right in a state employee to be paid FLSA overtime.", App. G., p. 58a, Petitioners have a contractual right to be compensated as promised by the Respondents, a well-established property right and protected interest in their wages. *Phillips v. Washington Legal Foundation,* 524 U.S. 156, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998) (Interest on client's funds is protected private property); *Leis v. Flynt,* 439 U.S. 438, 99 S.Ct. 698, 58 L.Ed.2d 717 (1979) (Claims to property right or entitlement must come from state law); *Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337, 340, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) ("We deal with wages – a specialized type of property presenting distinct problems in our economic system.")

E. Once a Protected Right Exists, There are Minimum Guarantees Virginia Must Provide.

Since Respondents have established a protected property interest, there are minimum rights and guarantees that a state, or its agency, must provide. These include notice and hearing, usually pre-deprivation. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1960); *Board of Regents v. Roth,* 408 U.S. 564, 569-570, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Bell v. Burson,* 402 U.S. 535, 542, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); *Boddie v. Connecticut,* 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). Due process may be satisfied post-deprivation when there is a meaningful post-deprivation remedy available. *Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). In this case, there was no pre-deprivation hearing and the post-deprivation remedy is not meaningful.

Obviously, the Petitioners' complaints to their supervisors do not satisfy the minimum requirements of due process because their supervisors, charged with the responsibility to pay them, are biased. Under VPA, there was no opportunity to have their claims heard by an unbiased decision maker. This violates the constitutional requirements of due process. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

F. Virginia Failed to Afford Petitioners those Minimal Rights Guaranteed by the 14th Amendment.

Because of the nature of Petitioners' contract claims, Virginia, through the VPA and DERC, has failed to provide any due process guarantees, let alone minimum guarantees. By reviewing their own conduct and precluding judicial review, the Respondents have violated the basic tenets of the 14th Amendment. In *Hudson v. Palmer*, this Court found that prisoners had a right, post-deprivation, to use the courts to redress that deprivation. *Hudson v. Palmer*, 468 U.S. 517, 523, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). Petitioners, police officers, are seeking the same remedy. Yet Petitioners allege that the failure to pay their earnings when the work is performed was intentional and part of Respondents' policy not to pay them these earnings. That is, the deprivation was not negligent, but an intentional policy of George Mason University. Therefore, the Respondents cannot rely on a claim that a post-deprivation remedy exists. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed. 265 (1982).

II.
AS A MATTER OF FEDERAL LAW, THE RIGHTS AFFORDED EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT ARE CONTRACT RIGHTS.

The duties claimed by the Police Officers arise from contracts for employment between the Police Officers and the University. By well-settled rules of both federal law and Virginia common law, the duties imposed on the University by the Fair Labor Standards Act provide for additional contractually-based rights or are implied into that contract for employment. Virginia and the University enjoy no sovereign immunity for actions based on their contracts. While the University may defend the imposition of implied duties which are *ex delicto*, based on soversign immunity, the duties imposed and/or implied by the Fair Labor Standards Act are *ex contractu*. This is shown by the long-standing jurisprudence in Virginia concerning contract claims against her and this Court's cases concerning the Seventh Amendment right to a jury trial. Because the duties that are imposed on the University are contractually based, the University does not enjoy the protection of sovereign immunity and must pay the Police Officers the compensation owed them.

A. The Legal Relationship Between the Police Officers and Their Employer Is Based in Contracts for Employment.

"The relationship of employer and employee can only exist by virtue of contract, express or implied." *Humphrees v. Boxley Bros. Co.*, 146 Va. 91, 97, 135 S.E. 890, 891 (1926); *See Sartin v. Mazur*, 237 Va. 82, 375 S.E.2d 741 (1989); *Monaham v. County of Chesterfield*, 95 F.3d 1263 (4th Cir. 1996). More specifically, as to the

Police Officers, the contracts were entered into by authority of the Virginia legislature. Code §23-236.B. Indeed, Virginia courts routinely express employer/employee duties and performance of those duties as contractually based. For example, "Virginia applies the common-law rule that an *employment contract* is presumed to be terminable at will. . . ." *Graham v. Central Fidelity Bank*, 245 Va. 395, 398, 428 S.E.2d 916 (1993) (*Citing Bowman v. State Bank*, 229 Va. 534, 535, 331 A.E.2d 797, 798 (1985) (emphasis added); *Buchanen v. City of Chesapeake*, 237 Va. 50, 375 S.E.2d 736 (1989) (Claim by city police for overtime is "a simple contract dispute" with a "contractual basis." *Id.* at 53. After bench trial, circuit court's decision that claimant's proof was insufficient to establish overtime as contract term upheld. *Id.* at 52); *Fun v. Virginia Military Institute*, 245 Va. 249, 427 S.E.2d 181 (1993) (Librarian's contract with VMI interpreted by court); *Underwood v. Henry County School Bd.*, 245 Va. 127, 427 S.E.2d 330 (1993) (County teacher's contract claim superceded by specific statutory reduction in force); *Falls v. Virginia State Bar*, 240 Va. 416, 397 S.E.2d 671 (1990) (Employee of state agency claim for breach of contract barred by statute of frauds); *Spotsylvania School Board v. McConnell*, 215 Va. 603, 212 S.E.2d 264 (1975) (Teacher's dismissal upheld as right to breach in contract because statutory rights of employer to dismiss, as the law in existence at formation of agreement, incorporated into contract). Thus, by well-settled law, the source of the duties between the University and Police Officers are duties imposed by the terms of contracts for employment. The trial court recognized this contractual relationship in overruling the Respondents' demurrers related to the contract claims.

B. Petitioners' Contracts for Employment Include the Fair Labor Standards Act As a Term.

The provisions of the Fair Labor Standards Act with respect to minimum wages, overtime compensation and liquidated damages are to be read into and become part of every employment contract subject to the act. *Roland Elec. Co. v. Black,* 163 F.2d 417, 426 (4th Cir. 1947), *cert. denied,* 333 U.S. 854, 68 S.Ct. 729, 92 L.Ed. 1135 (1948). By statutorily imposing into the Police Officers' employment contracts FLSA requirements, Congress extended the rights of all employees, including state employees to seek the remedies for violations of the FLSA. Only if a state is immune from suits to enforce contacts it made, can those rights be denied by state courts.[12]

C. Alternatively, The Fair Labor Standards Act Is an Action *ex Contractu* at Common Law.

It is long established that the FLSA claims are contractual claims. Under Virginia law, contractual claims include the common law action of debt. §73, *Burks Pleading and Practice* (4th Ed. 1952). " '[The action of debt's] distinguishing and fundamental feature consists in the fact that it lies for the recovery of *money,* or its equivalent, in sums certain, or that can be readily ascertainable by actual computation.' " §74, *Burks Pleading and Practice* (4th Ed. 1952) (emphasis in original). The action of debt includes the recovery of statutory penalties as well. §§74, 76, *Burks Pleading and Practice* (4th Ed. 1952). Thus, the Petitioners' FLSA action is

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[12] In prior United States Supreme Court decisions, the Court held that a state is immune from suit by its own citizens when the suit is in federal courts. *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

an action of debt, a claim *ex contractu.*[10] *See also Wirtz v. Jones,* 340 F.2d 901, 904 (5th Cir. 1965); *Lewis v. Times Publishing Co.,* 185 F.2d 457 (5th Cir. 1950).

D. The Right to a Jury Trial for Claims Arising Out of Violations of the Fair Labor Standards Act Demonstrates such Claims are *ex Contractu.*

The right to a jury trial for claims pursuant to the FLSA demonstrates that such actions are based in contract claims. "[I]t was well established that there was a right to a jury trial in private actions pursuant to the FLSA. Indeed, every court to consider the issue had so held." *Lorrillard v. Pons,* 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978) (*Citing Wirtz v. Jones,* 340 F.2d 901, 904 (5th Cir. 1965); *Lewis v. Times Publishing Co.,* 185 F.2d 457 (5th Cir. 1950); *Olearchick v. American Steel Foundries,* 73 F.Supp. 273, 279 (W.D. Pa. 1947); *and* Note, The Right to Jury Trial Under the Age Discrimination in Employment and Fair Labor Standards Acts, 44 U. Chi. L. Rev. 365, 376 (1977); Note, Fair Labor Standards Act and Trial by Jury, 65 Colum. L. Rev. 514 (1965)).

The right to a jury trial is based on the Seventh Amendment of the United States Constitution when actions are "clearly analogous to the 18th-century action in debt", *Tull v. United States,* 481 U.S. 412, 420, 107 S.Ct. 1831, 95 L.Ed. 365 (1987) (*reversing United States v. Tull,* 769 F.2d 182 (4th Cir. (Virginia) 1985), and applies to

---

[10] See *Wiecking v. Allied Medical Supply,* 239 Va. 548, 552, 391 S.E.2d 258, 260 (1990) (*Citing Hatzlachh Supply Co. v. United States,* 444 U.S. 460, 466, 100 S.Ct. 647, 651, 62 L.Ed.2d 614 (1980)), which states contract claims include even contracts implied in fact which contain elements of a tort.

causes of action created by congressional enactment. *Id.* at 417. (Citing *Curtis v. Loether,* 415 U.S. 189, 193, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974)). The Police Officers' causes of action are based on the action in debt, Part IIB, *supra.* Furthermore, courts consider the FLSA as based on an action in debt. *Wirtz v. Jones, supra; Lewis v. Times Publishing Co., supra; Olearchick v. American Steel Foundries, supra.*

III.
THE SUPREMACY CLAUSE BARS VIRGINIA FROM ALTERING FEDERAL LAW.

The Supremacy Clause, Art. VI, U.S. Constitution, clearly mandates that properly enacted federal law is the supreme law of the land. By interpreting its own laws to bar any judicial review of Fair Labor Standards Act claims, Virginia has violated that mandate. As is shown above, Virginia is not immune for its breach of contracts, including violations of the Fair Labor Standards Act, which is a contractually based cause of action. By removing the remedy afforded by 29 U.S.C. §216(b), to enter "any . . . State court of competent jurisdiction", the trial court violated the Supremacy Clause.

This case raises issues unlike those raised in *Alden v. Maine,* 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999), since the nature of the sovereign immunity superceded considerations of the Supremacy Clause. Rather, Virginia has never been immune for contract actions so there is no preserved sovereign immunity to consider.

CONCLUSION

Virginia's personnel act precludes any judicial review and any meaningful pre- or post-deprivation remedy. That preclusion violates the 14th Amendment's guarantee of due process. In addition, the Petitioners' Fair Labor Standard Act claims are contract claims which were barred by the same decision which precluded any review. Because Virginia is not immune from its contracts, the full rights and responsibilities imposed by the Fair Labor Standard Act are imposed on Virginia. This Court should grant Petitioners a writ of certiorari to determine that Virginia failed to provide the Petitioners due process before Virginia took Petitioners' protected property interest.

Respectfully submitted,

JOHN P. MC GEEHAN

GEORGE A. HAWKINS

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Fairfax, Virginia 22030
(703) 273-5303
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Counsel for Petitioners.

(2)
Supreme Court, U.S.
FILED
SEP 5 2000
OFFICE OF THE CLERK

No. 00-349

IN THE

SUPREME COURT OF THE UNITED STATES

CRAIG SCOTT DOUGALL, *et al.*,

Petitioners,

v.

THE RECTOR AND VISITORS OF
GEORGE MASON UNIVERSITY
and
THE COMMONWEALTH OF VIRGINIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

JOHN P. MCGEEHAN
(Counsel of Record)
GEORGE A. HAWKINS
(On Brief)

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APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 5th *day of* June, 2000.

Record No. 000496
Circuit Court Nos. 178905, 178906,
178907 and 178908

Craig Scott Dougall, et al.,

Appellants,

against

The Rector and Visitors of
George Mason University,

Appellee.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk
By: /s/ Wendy L. Duck
Deputy Clerk

APPENDIX B

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Case No. Law 178908

KARL RODRIGUEZ, et al.,

Plaintiffs

VERSUS

THE RECTOR AND VISITORS OF
GEO. MASON UNIV., et al.,

Defendants.

ORDER

This case came before the Court on the 9th day of December 1999, for Defendants' Demurrer and Pleas to the Amended Motion for Judgment.

It is ORDERED as follows: Count I: The Demurrer on the basis of the Virginia Personnel Act preclusion is sustained. The Plea of sovereign immunity as it relates to the VPA is sustained. The issue of the Statute of Frauds is delayed until trial. All other demurrers and pleas are overruled.

ENTERED on _____, 199__.

Seen and excepted to:

/s/ John P. McGeehan
John P. McGeehan, Esq.
McGEEHAN & ASSOCIATES

(703) 273-5303
Bar No. #9160
COUNSEL FOR THE PLAINTIFF

/s/ Sidney E. Rab
Sidney E. Rab, Esq.
Asst. Attorney General
(804) 786-1109
Bar No. #15105
COUNSEL FOR THE DEFENDANT

Count II. The Court's rulings are the same as upon Count I. On the Motions To Strike, the motions are granted as to attorney's fees; otherwise they are denied – except the plea of misjoinder is overruled without prejudice.

Plaintiffs are granted 21 days leave to amend if so advised. If no amended pleading is filed this matter stands dismissed with prejudice.

Entered on 9 December 1999.

/s/ Leslie Alden
JUDGE

APPENDIX C

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Case No. Law 178907

LORI-ALLEN LOGAN, et al.,

Plaintiffs

VERSUS

THE RECTOR AND VISITORS OF
GEO. MASON UNIV., et al.,

Defendants.

ORDER

This case came before the Court on the 9th day of December 1999, for Defendants' Demurrer and Pleas to the Amended Motion for Judgment.

It is ORDERED as follows: Count I: The Demurrer on the basis of the Virginia Personnel Act preclusion is sustained. The Plea of sovereign immunity as it relates to the VPA is sustained. The issue of the Statute of Frauds is delayed until trial. All other demurrers and pleas are overruled.

ENTERED on _____, 199__.

Seen and excepted to:

/s/ John P. McGeehan
John P. McGeehan, Esq.
McGEEHAN & ASSOCIATES

(703) 273-5303
Bar No. #9160
COUNSEL FOR THE PLAINTIFF

/s/ Sidney E. Rab
Sidney E. Rab, Esq.
Asst. Attorney General
(804) 786-1109
Bar No. #15105
COUNSEL FOR THE DEFENDANT

Count II. The Court's rulings are the same as upon Count I. On the Motions To Strike, the motions are granted as to attorney's fees; otherwise they are denied – except the plea of misjoinder is overruled without prejudice.

Plaintiffs are granted 21 days leave to amend if so advised. If no amended pleading is filed this matter stands dismissed with prejudice.

Entered on 9 December 1999.

/s/ Leslie Alden
JUDGE

APPENDIX D

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Case No. Law 178906

AMBER THERESE FOSTER, et al.,

Plaintiffs

VERSUS

THE RECTOR AND VISITORS OF
GEO. MASON UNIV., et al.,

Defendants.

ORDER

This case came before the Court on the 9th day of December 1999, for Defendants' Demurrer and Pleas to the Amended Motion for Judgment.

It is ORDERED as follows: Count I: The Demurrer on the basis of the Virginia Personnel Act preclusion is sustained. The Plea of sovereign immunity as it relates to the VPA is sustained. The issue of the Statute of Frauds is delayed until trial. All other demurrers and pleas are overruled.

ENTERED on _____, 199__.

Seen and excepted to:

/s/ John P. McGeehan
John P. McGeehan, Esq.
McGEEHAN & ASSOCIATES

(703) 273-5303
Bar No. #9160
COUNSEL FOR THE PLAINTIFF

/s/ Sidney E. Rab
Sidney E. Rab, Esq.
Asst. Attorney General
(804) 786-1109
Bar No. #15105
COUNSEL FOR THE DEFENDANT

Count II. The Court's rulings are the same as upon Count I. On the Motions To Strike, the motions are granted as to attorney's fees; otherwise they are denied – except the plea of misjoinder is overruled without prejudice.

Plaintiffs are granted 21 days leave to amend if so advised. If no amended pleading is filed this matter stands dismissed with prejudice.

Entered on 9 December 1999.

/s/ Leslie Alden
JUDGE

APPENDIX E

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Case No. Law 178905

CRAIG SCOTT DOUGALL, et al.,

Plaintiffs

VERSUS

THE RECTOR AND VISITORS OF
GEO. MASON UNIV., et al.,

Defendants.

ORDER

This case came before the Court on the 9th day of December 1999, for Defendants' Demurrer and Pleas to the Amended Motion for Judgment.

It is ORDERED as follows: Count I: The Demurrer on the basis of the Virginia Personnel Act preclusion is sustained. The Plea of sovereign immunity as it relates to the VPA is sustained. The issue of the Statute of Frauds is delayed until trial. All other demurrers and pleas are overruled.

ENTERED on _____, 199__.

Seen and excepted to:

/s/ John P. McGeehan
John P. McGeehan, Esq.
McGEEHAN & ASSOCIATES

(703) 273-5303
Bar No. #9160
COUNSEL FOR THE PLAINTIFF

/s/ Sidney E. Rab
Sidney E. Rab, Esq.
Asst. Attorney General
(804) 786-1109
Bar No. #15105
COUNSEL FOR THE DEFENDANT

Count II. The Court's rulings are the same as upon Count I. On the Motions To Strike, the motions are granted as to attorney's fees; otherwise they are denied – except the plea of misjoinder is overruled without prejudice.

Plaintiffs are granted 21 days leave to amend if so advised. If no amended pleading is filed this matter stands dismissed with prejudice.

Entered on 9 December 1999.

/s/ Leslie Alden
JUDGE

APPENDIX F

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

At Law/In Chancery No.:
L 178905
L 178906
L 178907
L 178908

Craig Scott Dougall, et al.,
Plaintiff/Complainant,

v.

The Rector and Visitors of George Mason University,
Defendant.

ORDER

This matter came to be heard on the 26th day of August, 1999 on the Plaintiff/Complainant/Defendant's Pleas of Sovereign Immunity, Statute of Frauds & Improper Joinder and Demurrer or Motion to Dismiss.

Upon the matters presented to the Court at the hearing, and for the reasons stated from the bench, it is hereby

ADJUDGED, ORDERED, and DECREED as follows:

1. The Court makes no ruling on Statute of Frauds, Virginia Personnel Act and misjoinder of parties.

2. The demurrer is sustained without leave to amend as to claims of interest and the demurrer is sustained with leave to amend as to the claim for punitive damages.

3. The Plea in Bar is granted and the cases dismissed as to Counts III and IV by virtue of sovereign immunity.

4. The demurrer is sustained as to Counts I and II with leave to amend for failure to allege compliance with V.C. § §2.1-223.1 and 8.01-192.

SEEN:

And Exceptions for reasons
stated in memorandums

/s/ John P. MeGeehan
Counsel for Plaintiffs/Complainant

SEEN:

/s/ Sidney E. Rab
Counsel for Defendant

Further ADJUDGED, ORDERED, and DECREED as follows:

5. Plaintiffs are granted twenty-one days to file its amended Motions for Judgment and Defendants shall respond within twenty-one days.

6. The evidentiary hearing set by Judge Smith for October 19, 1999 at 10:00 a.m. is removed.

Entered this 26th day of August, 1999.

/s/ David T. Stitt
Circuit Court Judge

SEEN: and Exception for reasons
stated in memorandums

/s/ John P. McGeehan
Counsel for Plaintiffs/Complainant

SEEN:

/s/ Sidney E. Rab
Counsel for Defendant

APPENDIX G

TRANSCRIPT OF PROCEEDINGS OF DECEMBER 9, 1999

VIRGINIA

IN THE CIRCUIT COURT
FOR THE COUNTY OF FAIRFAX

LAW No.: L178905

CRAIG SCOTT DOUGALL,
AND OTHER CURRENT POLICE
OFFICERS SIMILARLY SITUATED,

PLAINTIFFS

VS.

THE RECTOR AND VISITORS OF
GEORGE MASON UNIVERSITY,
AND
COMMONWEALTH OF VIRGINIA, ET AL.,

DEFENDANT.

THURSDAY, DECEMBER 9, 1999
FAIRFAX, VIRGINIA

THE ABOVE-ENTITLED CAUSE CAME ON TO BE HEARD IN THE CIRCUIT COURT OF FAIRFAX COUNTY, BEFORE THE HONORABLE JUDGE LESLIE M. ALDEN, JUDGE FOR THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA, IN COURTROOM

#5A, BEGINNING AT 10:00 A.M., WHERE THERE WERE PRESENT ON BEHALF OF THE RESPECTIVE PARTIES:

[2] COUNSEL FOR PLAINTIFF:

MCGEEHAN & ASSOCIATES
BY: JOHN MCGEEHAN, ESQUIRE
GEORGE A. HAWKINS, ESQUIRE
10615 JUDICIAL DRIVE
SUITE 403
FAIRFAX, VA 22030

COUNSEL FOR DEFENDANT:

OFFICE OF THE ATTORNEY GENERAL
BY: SYDNEY E. RAB, ESQUIRE
900 EAST MAIN STREET
RICHMOND, VIRGINIA 23219

* * *

[3] PROCEEDINGS

(THEREUPON, THE COURT REPORTER WAS SWORN.)

THE COURT: GOOD MORNING, EVERYONE. ALL RIGHT, THIS IS LAW 178905, 906, 907, AND 908, *CRAIG S. DOUGALL, ET AL. VERSUS GEORGE* MASON UNIVERSITY RECTORS, ET AL. *ARE THE* PARTIES READY TO PROCEED TODAY?

MR. RAB: WE ARE.

MR. MCGEEHAN: WE ARE, YOUR HONOR.

THE COURT: ALL RIGHT. ARE THERE ANY PRELIMINARY MATTERS?

MR. RAB: NO, YOUR HONOR.

MR. MCGEEHAN: NO.

THE COURT: ALL RIGHT, MR. RAB, THIS COMES ON THE DEFENDANT'S DEMURRER AND PLEA IN BAR.

MR. RAB: THANK YOU, YOUR HONOR. I'M SYDNEY RAB, ASSISTANT ATTORNEY GENERAL. I'M APPEARING TODAY FOR THE RECTOR AND VISITORS OF GEORGE MASON UNIVERSITY AND AS WELL FOR THE COMMONWEALTH OF VIRGINIA.

LET ME INTRODUCE THE CASE BY GOING THROUGH SOME OF THE HISTORY. THIS IS THE SECOND ROUND IN A WAY OF DEMURRERS AND PLEADINGS. THE PLAINTIFFS INITIAL PLEADING, I THINK THE MOTION FOR JUDGMENT WAS MARCH 15, '99, WAS RESPONDED TO MAY 11, '99 WITH DEMURRERS, PLEAS [4] OF SOVEREIGN IMMUNITY AND THE CASE OF THE STATUTE OF FRAUD.

ON AUGUST THE 26TH, JUDGE DAVID STITT HEARD US AND AT THAT TIME HE STRUCK FROM THE ORIGINAL AMENDED MOTION FOR JUDGMENT THE COUNTS THREE AND FOUR AS THOSE

TWO COUNTS HAD TO DO WITH THE FEDERAL FAIR LABORS STANDARDS ACTS.

THE SUPREME COURT OF THE UNITED STATES IN THE INTERIM WHILE THIS LITIGATION WAS NEW ON JUNE 23RD OF 1999 ENTERED THE *ALDEN V. MAINE* DECISION INVOLVING PROBATION OFFICERS OF THE STATE OF MAINE AND INVOLVING THE SAME FAIR LABOR STANDARDS AT ISSUE. SO JUDGE STITT STRUCK FROM THE CASE COUNTS THREE AND FOUR. HE ALSO GRANTED THE DEFENDANT'S DEMURRER WITH RESPECT TO COUNTS ONE AND TWO AND HE GRANTED THEM ON THE LIMITED BASIS THAT AS A THRESHOLD MATTER, THE PLAINTIFFS HAVE NOT PLED COMPLIANCE WITH WHAT I CALL THE PECUNIARY CLAIMS STATUTE, WHICH IS AT 8.01-192 OF THE CODE OF VIRGINIA.

JUDGE STITT FELT THAT THE PLAINTIFFS HAD TO AT LEAST RE-PLEAD THAT. JUDGE STITT SPECIFICALLY SAYS IN HIS ORDER THAT HE RESERVES FOR FURTHER HEARING SUCH QUESTIONS OF THE STATUTE OF FRAUDS AND THE VIRGINIA PERSONNEL ACT, WHICH I'M GOING TO EMPHASIZE TODAY.

[5] NOW, WITH RESPECT TO THE STATUTE OF FRAUDS, LAST WEEK COUNSEL SPOKE AND WE DECIDED THAT ON THIS GROUP OF DEMURRERS AND PLEAS TO THE AMENDED MOTION FOR JUDGMENT THAT WE WOULD NOT PRESENT THAT TO THE COURT. THE DEFENDANT CONCEDES THAT THERE IS ENOUGH FACTIONAL MATTER IN DISPUTE THAT IT SHOULD NOT BE HEARD AS A PLEA, THAT WE WOULD PREFER TO RESERVE FOR THE TIME OF TRIAL FOR THE DEFENSE OF THE STATUTE OF FRAUDS.

SO TODAY IN RESPONDING TO THE AMENDED MOTION FOR JUDGMENT, THE POINTS THAT I WANT TO EMPHASIZE ARE THE VIRGINIA PERSONNEL ACT AND THE QUESTION OF THE ALLEGATIONS BEING SUFFICIENT OR NOT SUFFICIENT AS A MATTER OF LAW TO STATE A CLAIM OF BREACH OF CONTRACT AGAINST THE COMMONWEALTH. THERE ARE ALSO ISSUES OF JOINDER, ISSUES OF ATTORNEY'S FEES, MISCELLANEOUS MENTIONS OF THE FAIR LABOR STANDARDS ACT, SOME MENTIONING WHICH—OF COLLECTIVE BARGAINING AND SOMETHING ABOUT THE NOTICE OF THE AMOUNT OF THE CLAIM. BUT I THINK IF WE FIRST FOCUS ON THESE TWO KEY ISSUES, I THINK IT PUTS THE CASE IN A POSTURE WHICH, YOUR HONOR, COULD CONSIDER DISMISSING WITH PREJUDICE.

THESE ARE STATE WORKERS. THE PLAINTIFFS ARE EMPLOYED AS POLICE OFFICERS AT GEORGE MASON UNIVERSITY [6] AND THE VIRGINIA CODE ADDRESSES IT IN SEVERAL SECTIONS THE STATUS OF POLICE OFFICERS, AND SPECIFICALLY STATES THAT THEY ARE SUBJECT TO THE VIRGINIA PERSONNEL ACT. THE VIRGINIA PERSONNEL ACT AND THE STATUTE WHICH FOLLOWS IT CONCERNING THE DEPARTMENT OF EMPLOYEE RELATIONS COUNSELORS SETS FORTH A GRIEVANCE PROCEDURE. IT'S THE ADMINISTRATIVE PROCEDURE.

IT'S OUR POSITION, AND I THINK IT'S BEEN THE RULINGS OF THE VIRGINIA SUPREME COURT, THAT THIS GRIEVANCE PROCEDURE IS THE WAY IN WHICH STATE WORKERS WHO ARE CLASSIFIED AND COME UNDER IT ARE TO CHALLENCE DECI—

SIONS REGARDING THE CONDITIONS OF THEIR EMPLOYMENT.

SPECIFICALLY, THE SUPREME COURT OF VIRGINIA IN 1989, IN THE CASE OF *MURRAY VERSUS STOKES*, AT 237 VIRGINIA 653, A 1989 CASE, WAS CONSIDERED AN EMPLOYEE OF THE DEPARTMENT OF CORRECTIONS. THAT EMPLOYEE SOUGHT TO FILE IN THE COURTS A BILL OF COMPLAINT AGAINST THE DIRECTOR OF THE DEPARTMENT OF PERSONNEL OF TRAINING. HE WAS ALLEGING THAT THE RULINGS AND THE RULES PROMULGATED BY THE DEPARTMENT OF PERSONNEL AND TRAINING WERE IMPROPER AND THAT HE SHOULD HAVE BEEN OFFERED A FULL-TIME POSITION AS A SPECIAL INVESTIGATOR.

AND I'M GOING TO QUOTE AT SOME LENGTH WHAT THE [7] SUPREME COURT SAID ABOUT THE VIRGINIA PERSONNEL ACT. THE COURT SAID, THE GENERAL ASSEMBLY ENACTED THE VIRGINIA PERSONNEL ACT, VIRGINIA CODE 2.1-110, ET SEQ., ESTABLISHING THE PROCEDURE AND POLICIES APPLICABLE TO EMPLOYMENT WITHIN THE COMMONWEALTH, YET CREATES A DEPARTMENT OF PERSONNEL AND TRAINING AND REQUIRES THE GOVERNOR TO APPOINT A DIRECTOR. THE DIRECTOR HAS THE GENERAL AUTHORITY TO ADMINISTER THE ACT AND HAS VARIOUS SPECIFIC RESPONSIBILITIES ASSIGNED TO HIM BY STATUTE OR DELEGATED TO HIM BY THE GOVERNOR, CODE 2.1-113.

THIS COMPREHENSIVE LEGISLATION INCLUDES PROCEDURES FOR HIRING, PROMOTING, COMPENSATING, DISCHARGING, AND TRAINING STATE EMPLOYEES. IT ALSO PROVIDES FOR A GRIEVANCE PROCEDURE. THE ACT BALANCES

THE NEED FOR ORDERLY ADMINISTRATION OF STATE GOVERNMENT AND PERSONNEL PRACTICES WITH THE PRESERVATION OF THE EMPLOYEE'S ABILITY TO PROTEST HIS RIGHTS AND PURSUE LEGITIMATE GRIEVANCES.

THIS DUAL GOAL—THESE DUAL GOALS REFLECT A VALID GOVERNMENTAL INTEREST IN AND A RESPONSIBILITY TO ITS EMPLOYEES IN THE WORK PLACE. ADMINISTERING AN ORDERLY PERSONNEL SCHEME REQUIRES THE ABILITY TO PROMULGATE AND INTERPRET AND APPLY RULES IN A CONSISTENT [8] MANNER.

SO IN *MURRAY* THE COURT GIVES US THE FRAMEWORK WITHIN WHICH WE CAN ANSWER THIS QUESTION, WHAT DO STATE WORKERS DO WHEN THEY ARE AGGRIEVED? DO THEY COME INTO COURT AND SUE A STATE AGENCY OR DO THEY USE THE GRIEVANCE PROCEDURES?

THE OTHER CASE WHICH I WANT THE COURT TO CONSIDER IS THE *SCHOOL BOARD OF THE STATE OF NORFOLK VERSUS ANASTASIA M. GIANNOUTSOS*, THAT'S G-I-A-N-N-O-U-T-S-O-S. IT'S ALSO A 1989 CASE AND IT'S CITED AT 238 VIRGINIA 144. THAT CASE INVOLVED A TEACHER AND THE SCHOOL TEACHER CONSIDERED NORFOLK HAD RETURNED TO THE SCHOOL DISTRICT AND SHE WAS ON A TEMPORARY STATUS AND WHEN IT CAME TIME FOR HER TO RECEIVE THE STATUTORY NOTIFICATION FROM THE CITY AS TO WHETHER OR NOT HER CONTRACT WAS GOING TO BE RENEWED FOR THE FOLLOWING YEAR, SHE DIDN'T GET ANYTHING AT ALL.

UNDER THE STATUTE IT SAYS THE IMPLICATION OR THE RESULT OF A PUBLIC SCHOOL TEACHER NOT GETTING NOTICE THAT SHE IS NOT

BEING RENEWED IS THAT HER CONTRACT SHALL BE RENEWED FOR THE NEXT YEAR. WELL, WHAT HAPPENED IN THE CASE IS SHE WENT AHEAD AND SHE FILED SUIT AND THE TRAIL COURT AGREED WITH HER THAT SHE WAS ENTITLED TO HER [9] CONTRACTUAL RIGHTS AND HE AWARDED HER THE SUM OF TWENTY-FOUR THOUSAND EIGHT HUNDRED DOLLARS FOR HER CONTRACT AND ALSO JUDGMENT–I'M SORRY, HE AWARDED HER LESS THAN THE FULL YEAR, HE AWARDED HER JUDGMENT OF FIFTEEN THOUSAND TWO HUNDRED AND TWENTY DOLLARS AND FORTY CENTS WITH INTEREST AND THE SCHOOL BOARD APPEALED.

WHAT THE SCHOOL BOARD SAID TO THE SUPREME COURT IS THE STATUTE TELLS US WHAT THE IMPLICATIONS ARE OF THE CITY OF NORFOLK'S FAILURE TO GIVE HER NOTICE THAT IT WOULDN'T RENEW HER CONTRACT. THE STATUTE SAYS SHE GETS RENEWAL OF HER CONTRACT. IT DOESN'T SAY ANYTHING ABOUT DAMAGES. AND THE SUPREME COURT AGREED. THE SUPREME COURT SAID THAT WE HAVE A STATUTE WHICH CREATES A RIGHT TO NOTICE OF RENEWAL AND NO SUCH RIGHT EXISTS IN THE ABSENCE OF STATUTE. THE STATUTE ALSO PROVIDES A REMEDY FOR THE VIOLATION OF THAT RIGHT.

AND IN A PENULTIMATE PARAGRAPH THE SUPREME COURT SAYS, ONE OF THE BASIC PRINCIPLES OF STATUTORY CONSTRUCTION IS THAT WHERE A STATUTE CREATES A RIGHT AND PROVIDES A REMEDY FOR THE VINDICATION OF THAT RIGHT AND THAT REMEDY IS EXCLUSIVE UNLESS THE STATUTE SAYS OTHERWISE.

NOW, IF WE TAKE THESE TWO CASES, *MURRAY VERSUS* [10] *STOKES* AND *SCHOOL BOARD VERSUS GIANNOUTSOS*, THEY ANSWER OUR QUESTION ABOUT THESE STATE WORKERS. THESE STATE WORKERS HAVE A REMEDY, A GRIEVANCE REMEDY. THE MOTION–THE AMENDED MOTION FOR JUDGMENT ALLEGES THAT WHEN PLAINTIFF DOUGALL ASKED OF THE HUMAN RIGHTS–I'M SORRY, HUMAN RESOURCES PERSONNEL AT THE UNIVERSITY WHETHER HE COULD GRIEVE ABOUT HIS WAGES, HE WAS TOLD YOU CAN'T GRIEVE ABOUT YOUR WAGES. AND I WOULD–I WOULD CONCEDE THAT THE STATUTE WHICH SETS FORTH WHAT THINGS ARE GRIEVABLE IS A BIT DIFFICULT.

THE STATUTE SAYS ON THE ONE HAND THAT DISPUTES ABOUT WAGES WOULD NOT BE GRIEVABLE. ON THE OTHER HAND, THE STATUTE SAYS THAT YOU MAY GRIEVE THE FAILURE ON THE PART OF THE AGENCY TO FOLLOW THE POLICIES AND PROCEDURES OF THAT AGENCY OR OF THE STATE. I THINK IT'S DEBATABLE. I THINK IT'S OPEN. I THINK SOMEDAY THERE WILL BE A STATE WORKER, UNLIKE MR. DOUGALL, WHO WILL ACTUALLY FILE A GRIEVANCE OR ACTUALLY HAVE A HEARING OFFICER MAKE A DETERMINATION, AND WILL ACTUALLY HAVE THE RIGHT TO HAVE A CIRCUIT COURT REVIEW THE GRIEVABILITY ISSUE AND DECIDE WHETHER OR NOT A COMPLAINT THAT I HAVE NOT BEEN PAID WAGES UNDER THE FAIR LABOR STANDARDS ACT IS VIOLATION OF STATE POLICY IS GRIEVABLE.

[11] SOMEDAY THAT WILL BE DECIDED BY HEARING OFFICER OR A CIRCUIT COURT JUDGE, AND PERHAPS EVEN THE SUPREME COURT OF

VIRGINIA, BUT BECAUSE OF THE *SCHOOL BOARD VERSUS GIANNOUTSOS* I DON'T THINK THIS COURT HAS TO WORRY ABOUT THAT ISSUE. I DON'T THINK THIS COURT HAS TO DECIDE WHETHER OR NOT MR. DOUGALL ACTUALLY COULD HAVE THE SPECIFIC RELIEF THAT HE'S SEEKING. ALL THE COURT HAS TO DECIDE IS THE GENERAL ASSEMBLY HAS CREATED WHERE THERE WAS NONE A RIGHT IN STATE WORKERS TO MAKE CLAIM AGAINST THE STATE AND THE GENERAL ASSEMBLY IS PROVIDING A GRIEVANCE AND ADMINISTRATIVE PROCEDURE.

THE GENERAL ASSEMBLY TOOK INTO ACCOUNT SUCH THINGS AS THE COST TO THE TAXPAYERS, THE COST IN TIME TO ALL THE PARTIES CONCERNED, AND THE RIGHTS–RESPECTIVE RIGHTS AND PRIVILEGES OF THE STATE EMPLOYEES AND DID A BALANCING AND CREATED THIS GRIEVANCE PROCEDURE, SAID CERTAIN THINGS ARE GRIEVABLE AND CERTAIN AREN'T, AND THAT'S THE REMEDY.

THE COURT: SO IS IT–IS IT THE POSITION OF THE DEFENDANTS THAT THESE STATE EMPLOYEES SIMPLY HAVE NO AVENUE TO REDRESS A COMPLAINT THAT THEY'RE NOT BEING PAID FAIRLY OR PROPERLY OR IN ACCORDANCE WITH THEIR AGREEMENT?

MR. RAB: YOUR HONOR, IT'S THE POSITION OF THE [12] DEFENDANTS THAT THE EXCLUSIVE REMEDY FOR STATE WORKERS TO COMPLAIN ABOUT MATTERS INVOLVING THE PAY OF EMPLOYEES, IS EXACTLY WHAT THE STATUTE SAYS.

THE COURT: BUT IF THAT STATUTE EXEMPTS THESE KINDS OF ISSUES–

MR. RAB: THEN THERE IS NO OTHER REMEDY PRESENT WITH THE GENERAL ASSEMBLY AS CREATED. JUST LIKE THE CREATION OF THE REMEDY IN THE VIRGINIA'S FOR DISABILITIES ACT WAS HELD TO BE EXCLUSIVE IN THE *MANNELL* CASE, WHICH I THINK WAS JUDGE MERHIGE'S FEDERAL COURT DECISION. ITMAY NOT BE PERFECT, BUT IT'S THE ONLY REMEDY THAT'S BEEN CREATED.

THAT'S–JUST LIKE THE *GIANNOUTSOS* CASE AND SEVERAL OTHER CASES THAT ARE CITED IN MY BRIEF, WHERE THE REMEDY CREATED IS INCOMPLETE, IT IS NEVERTHELESS THE REMEDY. IT EXCLUDES ALL OTHERS IT PRECLUDES. AND, YES, THAT'S OUR POSITION.

THE COURT: ALL RIGHT.

MR. RAB: THE OTHER LARGE ISSUE ABOUT THIS BILL–THIS AMENDED MOTION FOR JUDGMENT IS WHAT IT IS ATTEMPTING TO DO TO THE LAW OF CONTRACTS. IT'S BASIC TO THE LAW OF CONTRACTS THAT THE PARTY WHO WOULD INVOKE THE COURT WOULD SAY THERE HAS BEEN A PROMISE MADE AND THAT [13] PROMISE HAS BEEN BROKEN, AND I WAS DAMAGED AS A RESULT OF THAT PROMISE BEING BROKEN. BUT THAT'S NOT WHAT MR. DOUGALL AND HIS FELLOW EMPLOYEES HAVE SAID.

RIGHT IN THE AMENDED MOTION FOR JUDGMENT THEY SPEAK OF A PROMISE TO PAY A SALARY, TO PAY TWICE A MONTH, AND THEY SAY AND TO PAY OVERTIME FOR WORK IN EXCESS OF FORTY OR EIGHTY HOURS. THEY DON'T ALLEGE A COMPREHENSIVE WRITTEN CONTRACT. THEY MAY BE CONSTRUED–THE COURT MAY

DRAW TOGETHER THAT THIS CONTRACT IS AN AMOUNT OF WRITINGS AND ORAL PROMISES, BUT THEY HAVE ALLEGED A PROMISE TO BE PAID OVERTIME. I'LL CONCEDE THAT.

THEN WHEN THEY GET DOWN IN PARAGRAPHS, I THINK IT'S FIVE, SIX, SEVEN, AND EIGHT, THEY BEGIN TO ALLEGE A SERIES OF BREACHES. THEY SAY THAT THERE HAS BEEN A BREACH BECAUSE THE STATE HAS NOT PAID THEM FOR ROLL CALL, HAS NOT PAID THEM FOR THE TIME THEY SPENT AT HOME DOING THE WORK, HAS NOT PAID THEM FOR CERTAIN THINGS THEY DO BEFORE THEY COME ON SHIFT, OR FOR CERTAIN TRAINING TIME OR FOR MEALS, OR FOR TRAVEL ACTIVITIES. SO THEY HAVE A LIST AND THE AMENDED MOTION FOR JUDGMENT DETAILS THESE THINGS AND THEY SAY THAT THE UNIVERSITY DIDN'T PAY THEM FOR THESE THINGS.

THE PROBLEM IS THEY DON'T ALLEGE THAT THE [14] UNIVERSITY EVER PROMISED TO PAY THEM FOR THESE THINGS. AS A MATTER OF FACT, IN FIVE, SIX, SEVEN, AND EIGHT THE OFFICERS SPECIFICALLY ALLEGE THAT GMU DID NOT—WAS NOT WILLING, DID NOT AFFORD THEM PAY FOR THESE THINGS. THE INCONSISTENCY IN ALLEGING A BREACH OF CONTRACT WHICH REQUIRES A MEETING OF THE MINDS AND THEN ALLEGING THE DEFENDANT DID NOT AGREE TO PAYMENT FOR THIS TRAVEL, THIS TRAINING, THIS PRE-SHIFT WORK, THIS ROLL CALL, DID NOT AGREE TO PAY ME AND THEN SUING THE DEFENDANT FOR NOT PAYING IS APPARENT IN ITS INCONSISTENCY; IT'S APPARENT. BUT I THINK I CAN RESOLVE WHY WE HAVE THIS STATUS IN THE PLEADING.

THESE OFFICERS WANT WHAT THEY CONSTRUE THE FAIR LABOR STANDARDS ACT TO PROMISE THEM. THE FAIR LABOR STANDARDS ACT, THE FEDERAL LAW THAT HAS BEEN EFFECT FOR FIFTY-SOME YEARS, INCLUDES PROVISIONS DEFINING WORK WHICH IS NECESSARY AND INCLUSIVE AND PART OF THE PRINCIPLE ACTIVITIES. IF AN EMPLOYEE IS DOING SOMETHING WHICH IS PART OF HIS PRINCIPLE ACTIVITIES, THE FLSA WOULD SAY HE SHOULD BE PAID FOR THAT TOO. ON THE OTHER HAND, MERE COMMUTING, FOR EXAMPLE, WHICH IS NOT PART OF ONE'S PRINCIPLE ACTIVITIES, IS NOT CONSIDERED COMPENSABLE. IT MAY BE THAT BECAUSE AN OFFICER IS HARRIED BY VISITORS [15] DURING HIS MEAL PERIOD AND HE ABSOLUTELY DOES NOT GET A CHANCE TO BITE HIS SANDWICH WITHOUT SOMEONE BREATHING DOWN HIS NECK, IT MAY BE THAT THAT MEAL PERIOD SHOULD BE COMPENSABLE.

ON THE OTHER HAND, IF IT IS A THIRTY-MINUTE MEAL PERIOD IN WHICH HE'S FREE TO GO TO MCDONALD'S OR ARBY'S OR SOME PLACE OFF CAMPUS, OR HE REALLY HAS A CHOICE AND OPPORTUNITY TO HAVE A FREE THRITY-MINUTE PERIOD, PERHAPS HE JUST LIKES THE SOCIAL ASPECTS OF BEING ON CAMPUS AND PERHAPS BEING BOTHERED. AS LONG AS THE UNIVERSITY IS AFFORDING HIM THE THIRTY-MINUTE PERIOD IN WHICH HE COULD LEAVE CAMPUS, THEN THE MEAL PERIOD IS NOT WORK.

SO THERE ARE LINES DRAWN BY THE FAIR LABOR STANDARDS ACT. AND I THINK WHAT WE HAVE HERE, IS WE HAVE A LAW-

SUIT ORIGINALLY DRAFTED WHEN GEORGE MASON AND THE STATE WERE AMENABLE TO LAWSUITS BY STATE WORKERS FOR VIOLATIONS OF THE FAIR LABOR STANDARDS ACT. SO YOU HAVE A PLEADING WHICH SAYS YOU DIDN'T DO THE KINDS OF THINGS IN TERMS OF GIVING US PAY FOR THIS TRAVEL TIME, THIS ROLL CALL, THIS PRE-SHIFT, THAT THE FAIR LABOR STANDARDS ACT CONTEMPLATES WE BE PAID FOR. IT SAYS YOU NEVER—IT ACKNOWLEDGES YOU NEVER PROMISED TO DO THIS.

[16] NOW THAT WE HAVE SEVERED LAW, THE SUPREME COURT'S DECISION AND THE LAW OF THIS CASE, NOW THAT WE HAVE A DECISION, THAT THE STATE MAY NOT BE COMPELLED TO MEET FLSA STANDARDS IN A STATE COURT PROCEEDING BECAUSE THE STATE'S SOVEREIGN IMMUNITY IS AFFRONTED BY BEING SUED BY VIRTUE OF THIS ACT OF CONGRESS, CONGRESS DID NOT EMPOWER TO ABROGATE STATE SOVEREIGN IMMUNITY.

NOW THAT WE HAVE THIS RULING THE STATE CANNOT BE HAULED INTO COURT ON COMPLAINTS ABOUT FAIR LABOR STANDARDS ACT COMPLIANCE, THEN WE HAVE TO LOOK AT THIS BREACH OF CONTRACT CLAIM THAT WAY. THEY WOULD HAVE TO HAVE A MEETING OF THE MINDS AND AGREEMENT. THEY WOULD HAVE TO SAY THAT THE PERSONNEL OFFICERS AT GEORGE MASON UNIVERSITY THAT WE—THAT WE SHOULD BE PAID FOR PRE-SHIFT, FOR ROLL CALL, FOR WORK WE DO AT HOME AND THEY BREACHED THAT PROMISE. ASSUMING THEY GET OVER ALL THE OTHER HURDLES

ABOUT LAWSUITS BETWEEN STATE WORKERS AND THE STATE AND WE GET TO SUBSTANTIVE CONTRACT LAW, THEY WOULD HAVE TO PLEAD A MEETING OF THE MINDS AND THEY DID THE OPPOSITE. THEY SAID THERE WASN'T A MEETING OF THE MINDS. GMU NEVER AGREED TO DO IT. SO ON THAT BASIS WE FIND, AND WE SUGGEST TO THE COURT, THAT THE AMENDED BILL OF COMPLAINT IS DEMURRABLE.

[17] NOW, I HAVEN'T SPOKEN VERY MUCH ABOUT THE SECOND COUNT. I FIND THE SECOND COUNT VERY DIFFICULT TO READ AND UNDERSTAND. I THINK THAT COUNSEL IN WRITING HIS MEMORANDUM CONCERNING THE SECOND COUNT STATES. I THINK THAT IN FAIRNESS THE SECOND COUNT IS EXPLAINED IN THE NINETEENTH PARAGRAPH AND I LEAVE IT TO THE COURT TO READ THE NINETEENTH PARAGRAPH. BUT I DON'T BELIEVE THAT IN THE NINETEENTH PARAGRAPH OR ANY OF THE SUBSEQUENT PARAGRAPHS THERE IS AN ALLEGATION THAT AT A PARTICULAR POINT IN TIME, A PARTICULAR PROMISE TO PAY TWENTY-FIVE DOLLARS PER HOUR WAS MADE WITH RESPECT TO A PARTICULAR TASK.

I DON'T BELIEVE THERE'S AN ALLEGATION THAT THAT WAS BROKEN WITH RESPECT TO A PERIOD OF TIME, WITH RESPECT TO A PARTICULAR JOB THAT WAS DONE, AND RESULTING DAMAGES. I THINK THERE'S MERELY AN ALLEGATION THAT GMU TOLD THE PLAINTIFF AND OTHER POLICE OFFICERS THAT FOR A SEPARATE AND INDEPENDENT EMPLOYMENT THEY ARE TO BE PAID TWENTY-FIVE DOLLARS AN HOUR.

WELL, THIS–THIS REALLY ISN'T ENOUGH. AND I'M NOT SURE THAT THIS IS WITHIN THE PERIOD OF LIMITATIONS, THIS AGREEMENT THAT THEY'RE TALKING ABOUT, AND I'M NOT SURE HOW IT WAS BREACHED, AND I'M NOT SURE [18]WHAT EACH PLAINTIFF CLAIMS IN TERMS OF BREACH OF THAT AGREEMENT. SO ON THAT BASIS I THINK COUNT TWO FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

I FIND THE JOINDER OF THESE PLAINTIFFS ALSO TO BE PUZZLING. WE RECOGNIZE THAT THE FAIR LABOR STANDARDS ACT, THE FEDERAL STATUTE, HAVE PROVIDED FOR A KIND OF GROUPING OR CLASS ACTION AND THAT WHEN THIS SUIT WAS ORIGINALLY FILED A LARGE GROUP WAS ASSEMBLED AND THEY GAVE THEIR CONSENTS AND THEY FILED TOGETHER. WE OBJECTED TO JOINDER THEN AND WE OBJECT TO JOINDER ESPECIALLY NOW.

VIRGINIA–VIRGINIA DOES NOT RECOGNIZE THE RIGHT OF A GROUP OF PLAINTIFFS EACH AND EVERY ONE OF THEM CLAIMING A CONTRACT WITH DIFFERENT DAMAGES AND DIFFERENT TIMES THAT THEY WORKED TO SUE TOGETHER. I HAVE SUGGESTED THAT IF THEY ARE CLAIMING THAT THEY ARE ALL UNDER ONE CONTRACT, THEN WE HAVE A PROBLEM BECAUSE THE STATE HAS NEVER ENGAGED IN COLLECTIVE BARGAINING, THE STATE IS PRECLUDED FROM ENGAGING IN COLLECTIVE BARGAINING AND THERE COULDN'T BE ONE CONTRACT. SO EITHER THEY HAVE A SERIES OF SEPARATE CONTRACTS AND THEY DON'T BELONG IN COURT CONSOLIDATED IN ONE

CIVIL ACTION, AS VIRGINIA DOES NOT RECOGNIZE PLAINTIFFS JOINING INDEPENDENT CLAIMS, OR THERE'S SOME KIND OF A COLLECTIVE BARGAINING AGREEMENT [19] COVERING THEM ALL WHICH I DON'T SEE HOW THE STATE COULD HAVE MADE ITSELF BOUND BY THAT BECAUSE IT'S PRECLUDED BY STATE LAW FOR THEM TO ENGAGE IN COLLECTIVE BARGAINING.

ALSO, THERE IS NO RECITATION AS TO THE DAMAGE THAT THE INDIVIDUAL PLAINTIFFS BEYOND SAYING IT'S ABOUT FIFTEEN THOUSAND DOLLARS OR IT'S IN EXCESS OF FIFTEEN THOUSAND DOLLARS. THE PLAINTIFFS HAVE NOT SUPPLIED THE DEFENDANT WITH ANYTHING WHICH YOU WOULD ORDINARILY SEE IN BREACH OF A CONTRACT. THAT IS A MONETARY AMOUNT. I BELIEVE EVEN THIS COURT FIXES THE FILING FEES FOR LAWSUITS BASED UPON THE AMOUNT AT ISSUE. AND IF THE AMOUNT AT ISSUE IS A FULL FIFTEEN THOUSAND DOLLARS WE SHOULD BE TOLD. IF IT'S TWENTY THOUSAND DOLLARS, IF IT'S THIRTY THOUSAND DOLLARS, WE SHOULD BE TOLD SO THAT THE STATE CAN RESPOND RESPONSIBLY IN TERMS OF ALLOCATING THE RESOURCES TO MEET THIS COMPLAINT.

THE COURT: IS YOUR ARGUMENT THAT THE DEFENDANT DOESN'T KNOW WHETHER THE AD DAMNUM IS FIFTEEN THOUSAND FOR ALL OF THESE PLAINTIFFS OR FIFTEEN THOUSAND PER PLAINTIFF OR–

MR. RAB: I THINK THAT IT READS THAT THEY–IT IS AT LEAST FIFTEEN THOUSAND DOLLARS FOR EACH, BUT THE FIFTEEN THOU-

SAND DOLLARS IS ONE AMOUNT AND A HUNDRED [20] THOUSAND IS ANOTHER AMOUNT, AND PLAINTIFFS IN A CIVIL LAWSUIT IN VIRGINIA ARE USUALLY EXPECTED TO EXPRESS IN AN AD DAMNUM AN AMOUNT.

I SHOULD FLIP BACK TO THE LANGUAGE. IT SAYS, FOR DAMAGES IN EXCESS OF FIFTEEN THOUSAND DOLLARS. IT SAYS PLAINTIFF, IT DOESN'T SAY PLAINTIFFS. THERE ARE TWO COUNTS. IT'S LEFT IN A WAY THAT WE DON'T KNOW WHAT WE'RE DEFENDING. WE KNOW THERE ARE LOTS OF PLAINTIFFS. THEY'RE ALL ON THE SAME LAWSUIT AND WE DON'T KNOW WHAT THEY'RE INDIVIDUALLY CLAIMING.

DOES YOUR HONOR HAVE ANYTHING FURTHER QUESTIONS?

THE COURT: NO, NOT AT THE MOMENT, MR. RAB.

MR. RAB: THANK YOU.

THE COURT: THANK YOU.

MR. MCGEEHAN: GOOD MORNING, YOUR HONOR.

THE COURT: GOOD MORNING, MR. MCGEEHAN.

MR. MCGEEHAN: I'M JOHN MCGEEHAN AND I AM REPRESENTING THE PLAINTIFFS IN THESE FOUR LAWSUITS.

THE COURT: WHY—WHY ARE THESE LAWSUITS DIVIDED UP THE WAY THEY ARE?

MR. MCGEEHAN: BECAUSE ACTUALLY WE'VE BROKEN—THE CLASS OF INDIVIDUALS, IF I MAY USE THAT WORD CLASS, I [21] DON'T WANT TO GET MYSELF INTO A CLASS ACTION, I'LL ADDRESS THAT ISSUE LATER AS TO WHY

THEY'RE SUING IN THAT CAPACITY, BUT THERE ARE FOUR–FOUR DIFFERENT RELATION–STATUS TO THE PLAINTIFFS AND THE UNIVERSITY. ONE ARE CURRENT POLICE OFFICERS; TWO IS FORMER POLICE OFFICERS; THREE IS CURRENT DISPATCHERS; AND FOUR ARE FORMER DISPATCHERS. AND GIVEN WHETHER OR NOT THEY ARE PRESENT OR FORMER EMPLOYEES IS THE NATURE OF THE RELATIONSHIP AT THE TIME THE SUIT WAS FILED CHANGED AND THERE IS ALSO A DIFFERENCE.

WHEN WE FILED THIS LAWSUIT, AS MR. RAB DID CORRECTLY SAY, THERE WAS NO RECOGNIZED IMMUNITY TO THE STATES FOR THE FAIR LABOR STANDARDS ACT. HOWEVER, UNDER THE FAIR LABOR STANDARDS ACT THERE IS A DIFFERENT WAY OF TREATING LAW ENFORCEMENT AND PUBLIC SAFETY OFFICERS AND THE DISPATCHERS DID NOT FIT WITHIN THAT CATEGORY; THEREFORE, IF AT THE TIME WE FILED THE LAWSUIT, THE FAIR LABOR STANDARDS ACT CLAIM WE WERE TO HAVE GONE FORWARD, THE RULES APPLICABLE UNDER THE FAIR LABOR STANDARDS ACT DIFFERED DEPENDING ON WHETHER THEY WERE DISPATCHERS OR POLICE OFFICERS. MAY I PROCEED?

THE COURT: GO AHEAD.

MR. MCGEEHAN: THANK YOU, YOUR HONOR. YOUR [22] HONOR, WHAT THIS CASE HAS LARGELY INVOLVED RIGHT NOW BEFORE THE COURT IS WHETHER OR NOT–IS A QUESTION OF PLEADING, NOT A QUESTION OF MERIT, IF I MAY SAY. AND, OF COURSE, WE DO BELIEVE THAT THE CASE DOES HAVE MERIT.

THE QUESTION BEFORE THE COURT TODAY WAS LARGELY ON DEMURRER AND ONE INSTANCE OF PLEA WHETHER OR NOT THE CASE HAS BEEN CORRECTLY PLED. NOW, MR. RAB MADE–I HAVE FIVE ARGUMENTS. HIS ARGUMENTS ARE, ONE, WHETHER OR NOT THE VIRGINIA LAW AS GOVERNING STATE EMPLOYEES, THE VIRGINIA PERSONNEL ACT, AND THEN THE DERC STATUTE. THE DERC STATUTE IS CHAPTER TEN POINT ZERO ONE. I HAVE THE ONE FROM 1995, WHAT HAPPENED WAS THEY CREATED THAT SEPARATE CHAPTER AND IT NO LONGER IS CALLED THE VIRGINIA PERSONNEL ACT, BUT IT SPLIT IF OFF, SO I'M GOING TO REFER TO THAT AS THE DERC CHAPTER. AND MR. RAB AND I ARE TALKING ABOUT THE SAME THING.

HIS SECOND ARGUMENT IS WHETHER OR NOT WE HAVE PROBABLY PLED CONTRACT. HIS THIRD ARGUMENT IS WHETHER WE HAVE PROPERLY ALLEGED IN COUNT TWO HOW THE CONTRACT WAS BREACHED. THE FOURTH ARGUMENT IS WHETHER OR NOT THERE IS JOINDER, AND IF THERE'S NOT A JOINDER, IF THIS ACT CONSTITUTES COLLECTIVE BARGAINING IN VIOLATION OF PUBLIC POLICY. AND THE FIFTH ARGUMENT IS THAT WE HAVE NOT [23] RECITED DAMAGES WITH ANY GREATER PRECISION THAN AT LEAST FIFTEEN THOUSAND DOLLARS.

GOING BACK FIRST OF ALL TO THE EXCLUSIVENESS OF THE REMEDY OF THE VIRGINIA PERSONNEL ACT. AS MR. RAB HAS CONCEDED, THE VIRGINIA PERSONNEL ACT DOES NOT EXPLICITLY ADDRESS THIS ISSUE. HOWEVER, I DO WISH TO REMIND THE COURT THAT WE HAVE PLED

IN PARAGRAPH TWENTY-ONE THAT THE OFFICERS DID GO TO THEIR SUPERVISORS. THEY DID GO TO THE HUMAN RESOURCE PERSON WHOM THEY WERE TOLD WAS IN CHARGE OF WAGE AND HOUR ISSUES AND THEY WERE TOLD BY THAT PERSON THAT THIS IS NOT A GRIEVABLE ISSUE. NOW, AS SUCH, THAT CERTAINLY WOULD–WOULD RAISE AN ISSUE OF ISSUE CONCLUSION IF IN FACT THEY DIDN'T PURSUE THAT.

THE SECOND POINT I WISH TO RAISE IS THAT WHEN MR. RAB TELLS YOU THEY HAVE A REMEDY, HE MEANS A THEORETICAL REMEDY, BECAUSE UNDER–IF IN FACT THIS WERE GRIEVABLE, THEY HAD TO FILE THE GRIEVANCE WITHIN THIRTY DAYS OF THE GRIEVABLE ACT. THIS COVERS A LONG PERIOD OF TIME ENCOMPASSING THE TIME WHEN THEY WERE TOLD IT WAS NOT GRIEVABLE. AND I DARE SAY THAT IF WE TRIED TO FILE A GRIEVANCE AT THIS POINT, WE'D NOW BE TOLD THIRTY DAYS WAS APPLICABLE AND WE NO LONGER WERE ABLE TO GRIEVE IT.

THIRD IS IN HIS CITING OF THE CASE OF *MURRAY* [24] *VERSUS STOKES*, HE'S RELYING ON DICTA. WHAT *MURRAY VERSUS STOKES* SIMPLY HOLDS IS THAT WHEN THE DIRECTOR OF THE DEPARTMENT OF PERSONNEL AND TRAINING MAKES AN INTERPRETATION OF POLICY THAT THAT IS NOT REVIEWABLE BY THE COURT. THE LANGUAGE CITED BY MR. RAB IS NOT THE HOLDING OF THE CASE. IN FACT THERE IS NO HOLDING IN–THAT TRULY COVERS THIS ISSUE, BUT I TURN THE COURTS ATTENTION TO SECTION 2.1-116.06 OF THE CODE, SPECIFICALLY PARAGRAPH THREE.

NOW—AND ITS OUR CONTENTION THIS SAYS THAT THIS IS NOT A GRIEVABLE ISSUE. NOW, GOING BACK TO THE WRITTEN ARGUMENT OF THE STATE IN THIS CASE, THEY SAY THAT WHEN THE GOVERNOR AND THE LEGISLATURE TRY TO MAKE THE DETERMINE—TO MAKE THE DETERMINATION, IT'S NOT FOR THE COURT TO OVERRIDE THAT DETERMINATION. AND I SUBMIT THE COROLLARY OF THAT ARGUMENT IS IF THEY HAVE MADE A DETERMINATION THAT SOMETHING IS NOT GRIEVABLE, THEN IT IS NOT FOR THE ATTORNEY GENERAL'S OFFICE TO ASSERT THE CONTRARY TO THE GOVERNOR AND THE LEGISLATURE. BUT PARAGRAPH THREE SAYS, CLAIMS RELATING SOLELY TO THE FOLLOWING ISSUES SHALL NOT PROCEED TO A HEARING—

THE COURT: NOW WHICH—WHICH SECTION ARE YOU REFERRING TO NOW?

[25] MR. MCGEEHAN: SECTION 2.1-116.06 SUBPARAGRAPH C. IT'S IN THE SUPPLEMENTAL PART ON PAGE 109. THIS PART HAS NOT BEEN AMENDED, BUT THAT SECTION HAS BEEN AMENDED SO IT'S IN THE SUPPLEMENT'

THE COURT: GO ON.

MR. MCGEEHAN: WHAT IT STATES IS CLAIMS RELATING SOLELY TO THE FOLLOWING ISSUES SHALL NOT PROCEED TO A HEARING. ESTABLISHMENT AND REVISION OF WAGES, SALARY, POSITION CLASSIFICATIONS, OR GENERAL BENEFITS. AND SO WHAT IT STATES IS THAT NOT ONLY IS IT NOT SUBJECT TO A HEARING, IT'S NOT EVEN GRIEVABLE IF IT RELATES TO THE ESTABLISHMENT OF WAGES AND THAT'S WHAT THIS LAWSUIT IS ABOUT.

WHEN YOU HEAR THE ARGUMENTS, YOUR HONOR, WHAT THE ARGUMENT BETWEEN THESE PARTIES ARE, THAT YOU ENTERED INTO A CONTRACT FOR EMPLOYMENT, PART OF THAT CONTRACT OF EMPLOYMENT WAS YOU WOULD PAY US, ONE, OVERTIME AND, TWO, YOU WOULD PAY US TWENTY-FIVE DOLLARS AN HOUR FOR OUTSIDE EMPLOYMENT. THE ARGUMENT BY THE PLAINTIFFS IS THAT YOU DIDN'T PAY US. THE STATE, THUS FAR, HASN'T TAKEN A POSITION OF, YEAH, WE PAID YOU OR NO, WE DIDN'T PAY YOU. BUT IMPLICIT IS YOU CAN'T DO ANYTHING ABOUT IT.

SO THE ISSUE IS WHETHER OR NOT THE [26] ESTABLISHMENT AND REVISION OF WAGES AS OVERTIME OR WAGES OR BENEFITS AS TO THE OUTSIDE EMPLOYMENT. AND WHAT C SAYS IS THAT IS NOT GRIEVABLE, THAT IS NOT SUBJECT TO A HEARING—A GRIEVANCE HEARING ITSELF AND LASTLY I GO BACK AND RECAPTURE THE POINT THAT IF INDEED THE PLAINTIFFS WERE TO ASSERT THE RIGHT AT THIS POINT, AFTER HAVING BEEN TOLD THEY DIDN'T HAVE THE RIGHT, THEY WOULD BE TOLD THEY'RE TOO LATE BY SEVERAL YEARS BECAUSE IT'S A THIRTY-DAY GRIEVANCE ISSUE. AND I THINK IN THAT ARGUMENT WE HEAR THE SAME ARGUMENT FROM MR. RAB WHICH IS THE SANCTITY OF THE STATUTE HAS TO BE ABIDED BY AND IT'S A THIRTY-DAY GRIEVANCE PERIOD.

THE COURT: WELL, HIS POSITION IS, THOUGH, AS I UNDERSTAND IT, THOUGH, THAT THIS IS JUST SOMETHING THAT A STATE EMPLOYEE CAN'T COMPLAIN ABOUT.

MR. MCGEEHAN: I HEARD YOUR QUESTION ON THAT.

THE COURT: THEN–

MR. MCGEEHAN: WHAT I WOULD–WHAT I WOULD TURN BACK ALMOST TO THE QUESTION, I THINK IT VIOLATES SOME RULE OF ORAL ARGUMENT NEVER TO ASK THE JUDGE A QUESTION. BUT, CAN WE CREATE A CONTRACT OF EMPLOYMENT, EMPLOY PEOPLE OVER A PERIOD OF TIME, NOT HONOR THAT–NOT HONOR THAT CONTRACT, WHICH IS THE ALLEGATION, AND [27] THEN SAY THERE'S NOTHING YOU CAN DO ABOUT IT. YOU JUST CAN'T PAY US.

I THINK BY VIRTUE OF THE STATE LAW, IN FACT ONE OF THE OTHER ARGUMENTS THEY RAISE ABOUT THE ABILITY TO SUBMIT CLAIMS FOR CONTRACT ONCE WE ALLEGE THAT THERE'S A CONTRACT INDEED THERE IS A REMEDY, WHICH IS ALLEGING– THEY ARGUED WE HAVEN'T ABIDED BY THAT, BUT THE STATE LAWS DO RECOGNIZE THAT THE STATE MAY BE SUED FOR ITS CONTRACT. AND AS WE HAVE PLED IN OUR OPPOSITION TO THE IMMEDIATE MOTION IS THAT ALL EMPLOYMENT RELATIONSHIPS ARISE IN THE NATURE OF CONTRACTS. SO IF THERE IS IN FACT A CONTRACT, WITH THE TERMS OF THAT CONTRACT LEFT OPEN TO BE ARGUED, BUT IN FACT THEY ARE NOT REMEDILESS BECAUSE THE STATE MAY BE SUED FOR ITS CONTRACTS.

THE COURT: WELL, BUT I GUESS THE DEFENDANT'S COMPLAINT IS THAT THE TERMS–AS THE DEFENDANT READS THE COMPLAINT, THE PLAINTIFFS ALLEGE THAT THIS IS WORK THAT OUGHT TO BE COMPENSATED AS PART OF THE

JOB, BUT THE DEFENDANT INTENTIONALLY REFUSES TO COMPENSATE AS PART OF THE JOB. NOT THAT THEY AGREED TO IT AND FAILED TO, BUT THAT THEY REFUSED TO CONSIDER THAT AS COMPENSABLE DUTY. DO I HAVE THAT RIGHT, MR. RAB?

MR. RAB: YES. YES. I THINK THAT'S WHAT FIVE, [28] SIX, SEVEN, AND EIGHT SAY.

MR. MCGEEHAN: THEN I THINK WHAT HAS TO HAPPEN IS WHEN GIVEN THE FACT THAT TO THE NATURE OF CONTRACT IS THE COURT HAS TO AT SOME POINT HEAR EVIDENCE ON WHAT WAS THE CONTRACT. WHAT MR. RAB ARGUES IS ALMOST AS IF THE ONLY CONTRACTS THAT EXISTS ARE THOSE EXPRESSED CONTRACTS WHEN HE TALKS ABOUT THE MEETING OF THE MIND, AND THE COURT IS WELL AWARE YOU HAVE–YOU HAVE CONTRACTS THAT ARE IMPLIED IN LAW–

THE COURT: WELL, BUT THAT'S NOT WHAT YOU'VE ALLEGED HERE.

MR. MCGEEHAN: NO, BUT WE'RE SAYING THAT–WHAT WE ARE SAYING HERE IS THAT THERE IS A PARTIALLY INTEGRATED CONTRACT AND A PARTIALLY INTEGRATED CONTRACT MAY ARISE FROM EITHER THE EXPRESSED AGREEMENTS OF THE PARTIES FROM WHAT WERE THE PRACTICES AND POLICIES OF THE UNIVERSITY.

SO WHEN THEY HIRE YOU, THEY SAY WE WILL PAY YOU IN ACCORDANCE WITH THE PRACTICE AND POLICIES OF THE UNIVERSITY. IN FACT I DON'T WANT TO STEP OUT OF BOUNDS OF THE DEMURRER, BUT I WOULD SUBMIT TO THE COURT AND REPRESENT TO THE COURT

THAT AT ONE POINT–SEE WHAT HAPPENED WAS –YOUR HONOR, I DON'T KNOW HOW FAMILIAR [29] YOUR HONOR IS WITH THE FAIR LABOR STANDARDS ACT, BUT AT ONE POINT THE FAIR LABOR STANDARDS ACT WAS NOT APPLICABLE TO STATES.

AND THEN THERE WAS A SERIES OF CASES AND ULTIMATELY THE *GARCIA* DECIDED IT WAS. WELL, I WOULD SUBMIT TO THE COURT THAT THE EVIDENCE WILL SHOW THAT THERE WAS A TIME PRIOR TO *GARCIA* THAT THE UNIVERSITY DID PAY OVERTIME AND THAT THAT ITSELF INDICATES THAT IT WAS THE PRACTICE AND POLICY OF THE UNIVERSITY TO PAY ITS EMPLOYEES OVERTIME. THE EVIDENCE WILL SHOW THAT MOST OF THE EMPLOYEES HAVE BEEN PAID OVERTIME. WE HAVE ARGUED IN OUR OPPOSITION THAT IN FACT THE UNIVERSITY HAS PARTLY PAID THESE–THESE EMPLOYEES UNILATERALLY, I MEAN DURING THE ARGUMENT, BUT IT WASN'T A SETTLEMENT, BUT JUST SAYING WHEN WE MADE THE CLAIM, TWICE THEY HAVE PAID THEM OVERTIME. SO THAT THE AGREEMENT BETWEEN THE PARTIES DOES BESPEAK AN OBLIGATION TO PAY OVERTIME.

SO IT IS NOT AN ISSUE OF WHETHER OR NOT THEY WERE OBLIGED TO PAY OVERTIME, IT'S AN IMPORTANT FACT THEY HAVE DONE SO. THE QUESTION IS WHETHER THEY HAVE PAID ALL OF THE OVERTIME THAT WOULD BE DUE THEM IN ACCORDANCE WITH THEIR PRACTICES, POLICIES, AND EXPRESS REPRESENTATIONS TO THESE EMPLOYEES.

[30] MAY I PROCEED, YOUR HONOR?

THE COURT: GO AHEAD.

MR. MCGEEHAN: NOW, THE SECOND ISSUE IS THAT MR. RAB CITED THE–HE DIDN'T PUT IT IN HIS BRIEF SO I HAD TO WRITE IT DOWN PHONETICALLY, I THINK IT'S *GIANNOUTSOS* CASE. AS I HEAR THAT–

MR. RAB: IT'S IN THE REPLY BRIEF.

MR. MCGEEHAN: I DIDN'T FIND IT IN THE REPLY BRIEF WHEN I GLANCED AT IT. BUT IT SEEMS TO ME HIS REPRESENTATION OF THAT ONCE AGAIN SIMPLY SAYS THAT WHEN THERE IS A POLICY TO HANDLE GRIEVANCES THAT POLICY OUGHT TO BE FOLLOWED. BUT THE CONVERSE GOES BACK TO THE ARGUMENT THAT WHEN THE POLICY EXCLUDES THE HANDLING OF THIS PARTICULAR NATURE OF THE GRIEVANCE THAT IT DOES NOT. AND I FIND SOMETHING VERY, VERY CURIOUS. IF YOU TAKE THE FULL THRUST OF THE *MURRAY VERSUS STOKES* CASE THAT HE CITED, WHY HAVE THEY NOT COME BEFORE THIS COURT WITH AN INTERPRETATION EITHER BY THE DIRECTOR OF DERC, WHO HAS EXCLUSIVE AUTHORITY TO DETERMINE GRIEVABILITY, OR BY THE DIRECTOR OF THE DEPARTMENT OF PERSONNEL TRAINING, WHICH UNDER *MURRAY VERSUS STOKES* IS AN UNREVIEWABLE DECISION THAT SAYS IN FACT THESE CLAIMS ARE INDEED SUBJECT TO GRIEVANCE. THEY–

[31] THE COURT: WELL, DOESN'T THAT WHOLE PROCESS HAVE TO BE INITIATED BY THE EMPLOYEE WHO IS MAKING A COMPLAINT? I MEAN THOSE–

MR. MCGEEHAN: THE EMPLOYEE DID. THE EMPLOYEE DID AND THAT'S WHAT WE PLED. THEY WENT TO THE FIRST–GRIEVANCE PROCEDURES, FIRST YOU GO TO YOUR IMMEDIATE

SUPERVISOR, THEN YOU GO TO THE SUPERVISOR ABOVE THAT. THEY HAVE ALLEGED IN THIS CASE THAT, ONE, THEY WENT TO HUMAN–THEY WENT TO THEIR SUPERVISOR WHO REFERRED THEM TO HUMAN RESOURCES WHO REFERRED THEM TO THE PERSON AT HUMAN RESOURCES WHO HANDLES THESE PROBLEMS AND THEY WERE TOLD IT WAS NOT GRIEVABLE.

NUMBER TWO, WE'VE ALLEGED THAT WE MADE THE CLAIM ON BEHALF OF THESE EMPLOYEES PRIOR TO FILING THE SUIT AND THAT THE PRESIDENT OF THE UNIVERSITY DELEGATED DOWN TO HIS REPRESENTATIVES THE HANDLING OF THAT CLAIM AND THAT THEY HAVE DENIED THE CLAIM. SO WHAT HAPPENS IS WE HAVE GONE THROUGH THOSE TWO STEPS. ONCE THE EMPLOYER INITIATES THE ACTION, THEN THE ACTION SHIFTS TO THE EMPLOYER TO EITHER, ONE, WITHIN FIVE DAYS TO DETERMINE THAT THE MATTER IS GRIEVABLE AND OUGHT TO BE SET FOR A HEARING. OR–OR, TWO, DENY THE GRIEVABILITY OF THE ISSUE. OR, THREE, RESOLVE IT.

[32] SO AT THAT POINT, THE INITIATIVE OR THE ONUS OF ACTION REALLY LAYING WITH THE UNIVERSITY. THESE ARE SIMPLY WORKERS. THESE ARE NOT HUMAN RESOURCE PEOPLE. THESE ARE NOT SOPHISTICATED PEOPLE. AND WHEN THEY INITIATED THE ACTION WITH THEIR FIRST LINE SUPERVISORS WHICH THEY THOUGHT TO DO, THEN THEY WERE REBUFFED AND TOLD THIS IS NOT A GRIEVABLE ISSUE. THEN THEY TURNED TO ATTORNEYS, AS ATTORNEYS WE PRESENTED THE CLAIM ON BEHALF OF THEM, AND WE WERE ULTIMATELY TOLD THE CLAIM

IS DENIED. AND THE UNIVERSITY AT THAT POINT DID NOT THEN SET THE MATTER FOR A GRIEVANCE BOARD NOR DID THEY TELL US TO FILE A GRIEVANCE NOR DID THEY THEMSELVES REQUEST A GRIEVANCE THROUGH THE DERC PROCESS.

NOW, GOING DOWN TO THE–AGAIN, THE, I BELIEVE THE *MERRILL* CASE THAT MR. RAB CITED, WHICH HE TALKED TO, HE GAVE REFERENCE OF AN ILLUSION TO JUDGE MERHIGE'S RULING ON THE BDA. IT'S A DIFFERENT ISSUE WHEN THE RIGHT IS CREATED BY STATUTE VERSUS THE RIGHT IS TO AN EXISTING CONTRACT, AS IS INVOLVED IN THIS CASE. SO I'D SUBMIT THAT THAT CASE ITSELF HAS NO APPLICABILITY. SO WHEN YOU SAY LIKE UNDER *MERRILL* THAT THERE IS NO REMEDY UNLESS IT PROVIDES FOR IN THE BDA, BECAUSE WHATEVER RIGHT–THERE'S NO INHERENT RIGHT TO NOT BE DISCRIMINATED AGAINST [33] BECAUSE OF DISABILITY AND WHAT HAPPENS IS THAT WHATEVER RIGHT DID EXIST HAD TO HAVE BEEN CREATED BY STATUTE. THE HOLDING WAS IN THAT CASE IS IT DIDN'T GIVE A REMEDY TO INDIVIDUALS OR A RIGHT TO SUE. IN THIS CASE WE SAY THERE'S A CONTRACT–COMMON LAW–CONTRACT.

NOW, TURNING TO THE SECOND ARGUMENT–

–THE COURT: BEFORE YOU DO. SO YOUR–YOUR RESPONSE TO THE ARGUMENT THAT THE PROCEDURE–THE PERSONNEL ACT IS THE EXCLUSIVE REMEDY IS THAT IT DOESN'T COVER THIS COMPLAINT, THEREFORE, IT CAN'T BE THE EXCLUSIVE REMEDY?

MR. MCGEEHAN: THAT'S CORRECT. AND IS NOT PRECLUSIVE TO TAKE ANOTHER ACTION.

THE COURT: ALL RIGHT.

MR. MCGEEHAN: TURNING TO THE SECOND ARGUMENT, HE ARGUES THAT–AND AGAIN THIS IS REALLY WHETHER OR NOT WE HAVE PROPERLY PLED CONTRACT, BUT HE SAID THAT WE HAVE–WE HAVE FAILED TO ALLEGE A BREACH OF CONTRACT. IF THE COURT REVIEWS PARAGRAPHS FOUR THROUGH ELEVEN, AND I BELIEVE IT'S TWENTY-FIVE OR TWENTY-SIX OF OUR COMPLAINT, WE DO ALLEGE THAT THERE'S A CONTRACT BETWEEN THE PARTIES, A CONTRACT INCLUDES THE OBLIGATION TO PAY THE WAGES THAT WE'VE SAID, AND THAT IN FACT THEY BREACH [34] THE CONTRACTS. SO CERTAINLY IT IS A MATTER OF DEMURRER THAT IS SUFFICIENT UNDER THE LAWS OF DEMURRER TO ALLEGE THE EXISTENCE OF A CONTRACT, THE BREACH OF A CONTRACT, AND DAMAGES FROM A CONTRACT.

HE, UNDER THAT SAME ARGUMENT, GOES BACK TO HIS ARGUMENT OF SOVEREIGN IMMUNITY AND– I'LL–I'LL–PERHAPS I DIDN'T GRAB WHAT HE WAS SAYING WHEN HE WAS SAYING THAT, BUT AGAIN I JUST REFER BACK TO THE EARLY ARGUMENT THAT WE HAD, WHICH IS RECITED LARGELY IN THE CASE OF *WEEKY (SIC) VERSUS ALLIED MEDICAL* WHICH APPEARS ON PARAGRAPH FIVE OF OUR ORIGINAL OPPOSITION, IT'S 239 VIRGINIA 548, AND THAT CLEARLY SAYS IMMUNITY DOES NOT EXIST IN THE COM*MONWEALTH FOR SUITS IN CONTRACT. SO IF* HIS ARGUMENT IS A CONTRACT CLAIM IS NOT WELL FOUNDED AGAINST THE COMMONWEALTH BECAUSE THERE'S IMMUNITY, THEN THE CASE LAW OBJECTS THAT. AND AS WE ALSO POINTED

OUT IN OUR OPPOSITION, I DARE SAY, YOUR HONOR HAS SAT IN THIS COURT FOR A FEW YEARS, YOU'VE PROBABLY HEARD SOME SUITS IN CONTRACT IN THE COMMONWEALTH AND THEY HAVE FAILED AND DESPITE THE INVITATION TO DO SO TO MAKE A DISTINCTION ON WHY THEY'RE IMMUNE FROM SOME CONTRACTS BUT THEY'RE NOT IMMUNE FROM OTHER CONTRACTS. I DON'T BELIEVE THE COMMONWEALTH EVER INTENDS TO SAY WE CANNOT BE SUED OR NO [35] CONTRACT CAN BE ENFORCED AGAINST US UNDER THE POLICY OF THIS COMMONWEALTH.

AND, THIRDLY, UNDER THE STATUTE T-SELF, IT DOES RECOGNIZE THAT CONTRACT CLAIMS CAN BE PAID.

THE COURT: WHICH STATUTE?

MR. MCGEEHAN: THAT IS 8.01-192, YOUR HONOR. AND WHAT THEY'VE ALLEGED IN THAT CASE, I MIGHT SAY IN PASSING, THAT WE HAVE FAILED TO FOLLOW THE POLICIES IN THAT. WHAT HAPPENS IS THAT YOU CAN EITHER PRESENT A CLAIM TO THE HEAD OF THE AGENCY AND THEY HAVE TO DENY IT AND THEY'VE ALLEGED ALSO THEY FAILED TO DENY IT IN WRITING. AND I DON'T THINK THERE'S MUCH DISPUTE THAT WE'VE MADE A CLAIM TO PRESIDENT BURTON IN THIS CASE AND THAT ON THE ALLEGATION OF THE PLEADING IS THAT IT WAS DENIED. THEY HAD MADE THE ALLEGATION THAT IT WASN'T DENIED IN WRITING, BUT THE ONUS OF PUTTING IT IN WRITING IS ON THE UNIVERSITY.

AND, AGAIN, I WOULD TURN AND ASK THE QUESTION OF IF THE UNIVERSITY ELECTS NEVER TO PUT IT IN WRITING, JUST–JUST ON A WHIM, THEN NO CLAIM WOULD EVER ARISE AND PERHAPS ARGUMENT COULD BE FATAL. BUT I DON'T THINK IT'S EVER THE INTENTION SIMPLY BECAUSE THE HEAD OF AN [36] AGENCY DECIDES TO SIT ON THIS THING THAT NO ONE COULD EVER BRING A CAUSE OF ACTION. AND WE WOULD SUBMIT THE EVIDENCE WILL SHOW THAT THE CLAIM IN FACT WAS DENIED, WHICH IS THE PURPOSE OF THAT STATUTE.

MR. RAB ON THE THIRD ARGUMENT SAID THAT WE HAVEN'T ALLEGED AS TO A BREACH OF THE SECOND CONTRACT.

THE COURT: WELL, WHAT IS THE DIFFERENCE BETWEEN YOUR COUNT ONE AND COUNT TWO?

MR. MCGEEHAN: DIFFERENT WAGES. THE–WHAT HAPPENS IS THESE INDIVIDUALS WERE HIRED TYPICALLY FOR A SALARY TO PERFORM THE OFFICERS DURING REGULAR ASSIGNED DUTY HOURS AS POLICE OFFICERS–SWORN POLICE OFFICERS AT THE UNIVERSITY. THEY'RE ACTUALLY STATE POLICE OFFICERS, BUT NOT STATE POLICE. AND THAT IS COUNT ONE.

COUNT TWO SAYS THAT DURING THE COURSE OF THAT EMPLOYMENT THEY WERE TOLD THAT THEY COULD PERFORM SERVICES OUTSIDE OF THOSE REGULAR DUTY HOURS. AS WE PUT IN OUR PLEADINGS, TWO TYPICAL AREAS WHERE THEY WERE OFTEN ASSIGNED WERE PERFORMANCES AT THE PERFORMANCE CENTER FOR THE PERFORMING ARTS AND AT THE PATRIOT CENTER. AND THEY WERE–THEY WERE

TOLD ORALLY THAT THEY WOULD BE PAID TWENTY-FIVE DOLLARS AN HOUR FOR THAT TIME. THEY THEN PERFORMED THOSE SERVICES BUT THEY WEREN'T PAID TWENTY-[37] FIVE DOLLARS AN HOUR BUT EXPENSES WERE DEDUCTED FROM THAT, SO THE NET SUM WAS DIFFERENT.

SO IT IS MOONLIGHTING I THINK AS WE TERM IT IN OUR PLEADING. SO THERE IS, ONE, A CONTRACT WITH A BASIC EMPLOYMENT AS POLICE OFFICERS FOR THE UNIVERSITY AND TWO IS MOONLIGHTING FOR SECURITY FOR THESE OUTSIDE EVENTS.

NOW, HE ALLEGED THAT WE HADN'T–WE HADN'T ALLEGED THAT THERE WAS A BREACH. IN PARAGRAPH TWENTY-EIGHT WE DO ALLEGE THERE WAS A BREACH. AND FOR THE PURPOSES OF PLEADING AGAIN, IT IS SUFFICIENT FOR US SIMPLY TO ALLEGE THE BREACH AND IF THAT NEEDS TO BE FLESHED OUT, IT NEEDS TO BE FLESHED OUT BY WAY OF DISCOVERY.

THE COURT: ALL RIGHT. YOU SAID PARAGRAPH TWENTY-EIGHT. WHICH CASE IS THAT ON?

MR. MCGEEHAN: THAT IS IN THE AMENDED COMPLAINT.

THE COURT: IN–I'M LOOKING AT THE AMENDED COMPLAINT IN THE *FOSTER* CASE–

MR. MCGEEHAN: *DOUGALL*–

THE COURT: ALL RIGHT.

MR. MCGEEHAN: –*DOUGALL*; PAGE ELEVEN, *DOUGALL*. WE SORT OF ALL WORKED THAT'S OUR INITIATING ONE, AND WE HAVE OFFICER DOUGALL WITH US. DID OFFICER–WHETHER HE'S ENGAGED IN COLLECTIVE BARGAINING, HE'S BEEN THE POINT MAN–

THE COURT: OKAY.

MR. MCGEEHAN: IT SAYS DID YOU BREACH THE–BUT UNFORTUNATELY IT'S UNGRAMMATICAL, THE SEPARATE CONTRACT WITH PLAINTIFF BY NOT PERFORMING THE MATERIAL TERMS OF THE CONTRACT. DID YOU BREACH A SEPARATE CONTRACT BY FAILING TO COMPENSATE THE PLAINTIFFS AT THE AGREED UPON RATE FOR ALL HOURS THE PLAINTIFF WORKED. BUT WE HAVE ALLEGED FOR NONPAYMENT AND THEN, AS IN ANY DEBT CASE, THE ANSWER MAY BE HOW MUCH DIDN'T WE PAY YOU AND WHAT IS THE NATURE OF YOUR CLAIM.

THEN JUMPING AHEAD ACTUALLY TO NUMBER FIVE, I'LL COME BACK TO NUMBER FOUR, WHICH IS WHETHER OR NOT YOU HAVE TO MAKE A RECITATION OF DAMAGES. WE RELIED IN PART ON THE ONE CASE OUT OF LOUDOUN, BUT FRANKLY IF YOU GO BACK TO THE OLD LAW OF VIRGINIA IN THE MATTER OF COMMON LAW PLEADINGS, THERE IS THE CASE OF *CRAGHILL*, C-R-A-G-H-I-L-L *VERSUS PAGE*, WHICH APPEARS AT TWO HENRY PAGES 446 AND 448. I HAVE COPIES OF THESE TO GIVE YOUR HONOR. *DIGGS VERSUS NORRIS*, WHICH APPEARS AT THREE HENRY [39]PAGE 266. AND *STEVENS VERSUS WHITE*, WHICH APPEARS AT TWO WASHBURN, PAGES 201 AND 203. AND WHAT ALL OF THESE CASES STAND FOR IS AS A MATTER OF PLEADING IS–WELL, AS MR. RAB SAID, IT MAY BE PRACTICE IN THIS COMMONWEALTH TO MAKE A SPECIFIC SUM AS A PART OF A PLEADING. IT DOESN'T MEAN THE PLEADING IS INSUFFICIENT IF YOU FAIL TO DO SO. AND WHAT'S UNIQUE IN THIS CASE IS WE'RE WAITING FOR DISCOVERY.

NOW, MR. RAB AND I HAVE REACHED AN AGREEMENT FOLLOWING A MOTION LAST WEEK OR PRIOR TO THE MOTION I SHOULD SAY LAST WEEK, THAT HE WILL FILE RESPONSES TO DISCOVERY THAT WE SUBMITTED AT THE SAME TIME THAT THE COURT MAY REQUIRE HIM TO FILE AN ANSWER IN THIS CASE. SO TO QUANTIFY WITH ANY EXACTITUDE, WE ACTUALLY NEED THEIR RECORDS. SO THAT'S WHY WE PLED IT AS WE DID. WE WEREN'T BEING UNDULY CLEVER, I HOPE. BUT WHAT WE ALSO SAY IS THAT UNDER THESE CASES, ALL OF WHICH ARISE IN THE BEGINNING OF THE NINETEENTH CENTURY, IS THAT IT DOES MAKE A PLEADING INSUFFICIENT BY FAILURE TO PLEAD AN EXACT SUM, BUT RATHER IF THE SUM OF PLEADINGS AT ANY POINT PRIOR TO THE ENTRY OF JUDGMENT ANYWHERE IN THE RECORD THEN IT'S SUFFICIENT. AND THEY ALSO APPLIED THE STATUTE OF JAIL BILL (SIC) WHICH ALLOWS THE CORRECTION OF ANY RECORD AS [40] LONG AS IT APPEARS WITHIN THE RECORD IF IT'S SIMPLY AN OMISSION.

NOW, I DON'T KNOW IF THAT TRULY IS APPLICABLE HERE BECAUSE IT WAS AN INTENTIONAL OMISSION BUT CERTAINLY BEFORE THIS CASE COMES TO TRIAL WE WOULD–WE WOULD GIVE THEM WITH SPECIFICITY WHAT THE AMOUNT OF THE DAMAGES ARE, BUT WE NEED THEIR RECORDS TO DO SO.

AND THEN THE THIRD POINT IN THE NATURE OF HOW WE PLED THE CASE IS THAT BECAUSE IT IS SUFFICIENT AND MEETS MINIMAL STANDARDS AND WILL BE FLESHED OUT WITH DISCOVERY THAT THEY HAVEN'T REALLY BEEN PREJUDICED IN ANY ASPECT IN THIS REGARD BY PLEADING

AS WE DID AND PRACTICED. I GUESS WHAT I THINK ABOUT IS HOW OFTEN, I DON'T KNOW THAT YOUR HONOR DID THIS WHEN YOU PRACTICED LAW, THAT A LOT OF TIMES THE AD DAMNUM IS NO MORE THAN A GOOD GUESS, AND I GUESS I COULD PUT IN A MILLION DOLLARS OR I COULD PUT IN MORE THAN FIFTEEN THOUSAND DOLLARS AND NEITHER ONE IS GOING TO INFORM THEM A WHOLE LOT. WE'RE GOING TO GET DISCOVERY ON IT TO MAKE THAT NUMBER MORE PRECISE AND IT'S INCONSEQUENTIAL TO THE MATTER OF PLEADINGS WHETHER I GUESSED AT A MILLION OR SAID MORE THAN FIFTEEN THOUSAND.

SO GOING BACK AGAIN TO THE FACT OF WHETHER OR [41]NOT WE HAVE ALLEGED A BREACH. WE'VE ALLEGED A BREACH AND WE HAVE TO HAVE MORE SPECIFICITY, INDEED WE DO AND THAT'S A PROCESS I BELIEVE THAT WILL TAKE PLACE BY VIRTUE OF DISCOVERY.

THE LAST ARGUMENT WHICH I WISH TO ADDRESS IS THAT OF JOINDER. I BELIEVE MR. RAB HAS TRIED TO CREATE A DILEMMA FOR US. HE EITHER SAID THAT THESE OUGHT TO BE TWENTY-EIGHT SEPARATE CAUSES OF ACTION OR THAT WE HAVE ENGAGED IN COLLECTIVE BARGAINING. I THINK THAT THAT'S A FALSE ANALOGY ON HIS PART.

FIRST, LET ME EXPLAIN TO THE COURT WHY THE ACTION BEGAN AS IT DID. *ALDEN VERSUS MAINE* NEVER–DIDN'T THROW OUT THE FAIR LABOR STANDARDS ACT BUT SIMPLY SAID IS THAT–THAT A STATE IS IMMUNE FROM A SUIT UNDER THE FAIR LABOR STANDARDS ACT. IN THE FAIR LABOR STANDARDS ACT, WHICH CER-

TAINLY WAS TOTALLY VIABLE AT THE TIME THAT WE FILED THIS LAWSUIT, IT PERMITTED INDIVIDUALS TO SUE IN MORE OR LESS A REPRESENTATIVE MATTER, BUT IT'S NOT FULLY A CLASS ACTION. IT'S A PECULIAR ACTION FOR THE FAIR LABOR STANDARDS ACT, SO AT THE TIME THAT WE FILED THE SUIT, INDEED THAT IS VALID.

TWO, *ALDEN VERSUS MAINE* MAY SAY THERE'S A SUIT–THEY'RE IMMUNE FROM A RECOVERY ON A SUIT, BUT IT [42] DOESN'T MEAN THE PROCESS THAT BEGAN THE INITIAL LAWSUIT BEGINS ALL OVER AGAIN BECAUSE THE FAIR LABOR STANDARDS ACT IS NOT APPLICABLE TO THE STATE. IN FACT *ALDEN VERSUS MAINE* SAYS IT IS APPLICABLE TO THE STATE BECAUSE THE UNITED STATES GOVERNMENT THROUGH THE DEPARTMENT OF LABOR COULD INITIATE A SUIT, SO THERE'S NO QUESTION ABOUT THAT. SO I DON'T THINK *ALDEN* EVER THREW OUT THE PROCEDURE.

THIRDLY, IS AT THIS POINT I THINK WE EVEN MEET THE STANDARDS. AND WE ARGUED THIS LAST NIGHT IN FRONT OF JUDGE STITT. WE MEET THE STANDARDS FOR A PROPER JOINDER. AND THE COURT AT SOME POINT WHEN THEY FEEL WE DIDN'T MEET THE STANDARDS COULD SEVER THE LAWSUIT. SO THE PROCEDURE I MAY SUGGEST TO THE COURT IS WE GO FORWARD WITH DISCOVERY AND THEN AS WE'RE APPROACHING TRIAL DATE DECIDE DOES THE COURT WANT TO SEVER THESE ACTIONS. BUT IF YOU LOOK REALLY ABOUT THE–WHEN HE TALKED ABOUT EFFICIENCY AND ECONOMY–MR. RAB TALKED EFFICIENCY AND ECONOMY, THE QUESTION IS

DOES THIS COURT WANT TO MANAGE TWENTY-EIGHT LAWSUITS OR DOES IT WANT TO MANAGE FOUR LAWSUITS.

AND I THINK THE ARGUMENT–THE TELLING ARGUMENT, IF I MAY SAY SO, EFFICIENCY AND ECONOMY IS IN THESE EARLY STAGES OF PLEADING, AS WE ARE EFFECTIVELY ABLE TO DO HERE, WE WILL ARGUE THEM TOGETHER, HANDLE THEM [43] TOGETHER, AS AN ECONOMICAL MEASURE AND IF THERE COMES A POINT WHERE THERE IS SOME LEVEL OF PREJUDICE MORE OR LESS, WE DON'T EVEN KNOW WHETHER WE'RE GOING TO HAVE A JURY TRIAL RIGHT NOW, THAT'S ALWAYS THE ARGUMENT IN JOINDER, YOU USE A JURY TRIAL. I'VE ALWAYS HAD CONFIDENCE A JUDGE COULD SORT THESE THINGS OUT. BUT IF HE HAS A SUBSTANTIVE ARGUMENT ON WHY THERE IS SOME PREJUDICE TO THE DEFENDANTS TO LEAVE THESE MATTERS BE ADMINISTERED AT THIS POINT IN A COMMON FACTOR THAT THAT WOULD BE AN APPROPRIATE TIME TO MAKE IT.

SO I THINK THAT, ONE, THERE IS A CORRECT JOINDER AT THIS JUNCTURE. THERE WAS THE INITIATION OF THE PLEADING AT THIS JUNCTURE. THEN WE'RE NOT IN THE DILEMMA OF COLLECTIVE BARGAINING, BUT I DO WISH TO RAISE THAT ISSUE. RECITED TO THE COURT THE *ARLINGTON* CASE WHICH DEFINITIVELY DEFINES THE–WHAT IS COLLECTIVE BARGAINING IN VIRGINIA, AND THIS IS NOT COLLECTIVE BARGAINING SIMPLY BECAUSE PEOPLE MAY BE ASKING FOR SOME PROMISE OF ACTION. THERE HAS TO BE A MUTUALITY IN THAT SENSE WHERE THE STATE ACCEPTS AS A BARGAINING UNIT AND

THEY'RE BARGAINING ABOUT THE CURRENT CONDITIONS OF EMPLOYMENT AND NOT A BREACH OF A COMMON CONTRACT.

AND WE HAD SUGGESTED IN OUR BRIEF SANCTIONS [44] COULD EVEN BE APPROPRIATE FOR THAT, THAT ARGUMENT IS SO FACETIOUS. AND THEN CERTAINLY THERE IS NOT COLLECTIVE BARGAINING IN THIS CASE SIMPLY BECAUSE WE INITIATED THE ACTION AS PERMITTED AT THAT TIME UNDER THE FAIR LABOR STANDARDS ACT.

SO, THEREFORE, IN SUMMARY, YOUR HONOR, WHAT THIS CASE IS ABOUT IS, ONE, THE FAILURE TO PAY THEM IN ACCORDANCE WITH THEIR CONTRACT FOR SERVICES AS POLICE OFFICERS AND FAILURE TO PAY THEM AS THEY HAD REPRESENTED THEY WOULD DO FOR OUTSIDE EMPLOYMENT, OR MOONLIGHTING EMPLOYMENT. WE HAVE ALLEGED THE EXISTENCE OF A CONTRACT. WE HAVE ALLEGED A BREACH OF THE CONTRACT. AND WE HAVE ALLEGED DAMAGES. AND WE SUBMIT THAT OUR PLEADING IS SUFFICIENT FOR THAT PURPOSE. THANK YOU.

THE COURT: WELL, WHAT'S THE BASIS FOR THE PLAINTIFFS REQUEST FOR ATTORNEY'S FEES?

MR. MCGEEHAN: IT WAS WHETHER OR NOT THE TWO SEVENTY-ONE STANDARD WOULD BE MET FOR THEIR CLAIM ON COLLECTIVE BARGAINING. I SOMEWHAT UNDERSTOOD A LITTLE BETTER TODAY THAT WHAT HE REALLY WAS TRYING TO DO WAS PUT US INTO A LOGICAL DILEMMA. BUT WHEN HE FIRST ASSERTED THAT WE VIOLATED PUBLIC POLICY BY BRINGING

THESE LAWSUITS AND ENGAGING IN COLLECTIVE BARGAINING, I THOUGHT THAT [45] ARGUMENT WAS JUST SO ILL FOUNDED IN FACT AND LAW THAT TWO SEVENTY-ONE WAS APPLICABLE.

I MIGHT ALSO SAY THAT WHILE HE DOESN'T ARGUE IT, THE THRUST OF HIS ARGUMENT IS BY THE MERE FACT THAT I REPRESENT ALL OF THESE OFFICERS AS COLLECTIVE BARGAINING AND I'M A UNION AND I THINK THAT I'M NOT A UNION.

THE COURT: AT LEAST YOU DON'T CHARGE DUES.

MR. MCGEEHAN: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT, THANK YOU, MR. MCGEEHAN. MR. RAB?

MR. RAB: YOUR HONOR, THE DEFENDANTS HAVE ACTUALLY BRIEFED US FOUR TIMES AND I'VE SOMEWHAT FORGOTTEN, YOU HONOR. IT WASN'T THE JUDGE–THE FIRST–TIME OTHER JUDGES HAVE DEALT WITH THIS EXCLUSIVE REMEDY ISSUE–

THE COURT: YOU MEAN YOU'VE BRIEFED IT IN FOUR DIFFERENT COURTS OR IN THIS–

MR. RAB: NO, I–WE BRIEFED IN THIS CASE FOUR TIMES.

THE COURT: OKAY.

MR. RAB: YOU HAVE A PLEADING THAT WAS FILED JULY 6TH, 1999, AS DEFENDANT'S FIRST BRIEF AND THAT COVERED THIS VIRGINIA PERSONNEL ACT ISSUE. AND SO DID WE [46] COVER ON AUGUST THE 6TH OF 1999. WHAT I DIDN'T DO IS REWRITE THE SAME MATERIALS BUT I KNOW IT'S QUITE A BURDEN TO GO BACK AND

READ MORE, BUT WHAT I WANT TO MENTION TO YOUR HONOR IS TWO OTHER TRIAL COURT JUDGES HAVE DEALT WITH THIS ISSUE OF WHETHER THE VIRGINIA PERSONNEL ACT IS THE EXCLUSIVE REMEDY AND I CITE THEM IN I THINK THE JULY 6TH BRIEF AND I HADN'T MENTIONED THEM IN MY ORAL ARGUMENT.

IN THE CIRCUIT COURT FOR THE COUNTY OF MONTGOMERY IN THE CASE OF ALFRED CAPLE, AND I'LL READ THE COURT'S ORDER, PLAINTIFF ALFRED CAPLE ALLEGES THAT HIS DISCHARGE FROM EMPLOYMENT FROM THE VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY WAS TAINTED BY RACIAL DISCRIMINATION AND HE'S SEEKING RECOVERY UNDER STATE LAW AGAINST VPI AND HIS FORMER SUPERVISOR, MARGIE LAWRENCE. NOTING THAT THE PLAINTIFF'S COMPLAINT ALLEGES THAT HE'S RAISED THIS COMPLAINT WITH THE GRIEVANCE PROCEDURE FOR STATE EMPLOYEES AND THAT A GRIEVANCE PANEL UPHELD PLAINTIFF'S TERMINATION. DEFENDANT DEMURRED ARGUING THE POWER RULING WAS NOT REVIEWABLE BY THIS COURT AND THAT THE GRIEVANCE PROCEDURES EXCLUSIVE MEANS UNDER STATE LAW FOR CHALLENGING HIS TERMINATION. AND I GO TO THE ARGUMENT OF COUNSEL AND REVIEW THEIR BRIEFS THE COURT [47] FINDS THAT THE GRIEVANCE PROCEDURE FOR STATE EMPLOYEES PROVIDED GOVERNED BY CODE SECTION 2.1-110 OF THE CODE OF THE VIRGINIA, AS AMENDED, IS THE EXCLUSIVE MEANS UNDER STATE LAW BY WHICH A STATE EMPLOYEE COVERED BY THAT PROCEDURE CAN CHALLENGE HIS DISCHARGE.

MOREOVER, THIS COURT FINDS THAT THE RULING OF THE GRIEVANCE PANEL IN THIS CASE IS ENTITLED TO RES JUDICATA BEING BASED UPON A FULL EVIDENTIARY HEARING.

I'LL CONCEDE THAT WAS A DISCHARGE CASE. THERE IS ALSO THE CASE OF MICHAEL SIGMON, WHICH IS IN THE CIRCUIT COURT OF BOUTETORT COUNTY–

THE COURT: BOUTETORT.

MR. RAB: BOUTETORT. THANK YOUPLAINTIFF MICHAEL SIGMON ALLEGES IN HIS MOTION FOR JUDGMENT THAT THE COMMONWEALTH OF VIRGINIA DEPARTMENT OF ALCOHOL BEVERAGE CONTROL WRONGFULLY DISCHARGED HIM IN VIOLATION OF VIRGINIA PUBLIC POLICIES SET FORTH AND VARIOUS STATUTES. FOR THE WRONGS ALLEGED IN THAT MOTION FOR JUDGMENT, WHICH INCLUDES VIOLATIONS OF SUBSTANTIVE AND PROCEDURAL RIGHTS, PLAINTIFF SEEKS COMPENSATORY AND PUNITIVE DAMAGES AS WELL AS COST OF ATTORNEY'S FEES.

THE SOLE DEFENDANT NAMED IN PLAINTIFF'S MOTION FOR JUDGMENT IS THE COMMONWEALTH OF VIRGINIA ALCOHOL [48] BEVERAGE AS WELL AS THE AGENCY. DEFENDANT DEMURRER ARGUING PLAINTIFF'S CLAIM WAS BECAUSE THE BAR–BECAUSE THE VIRGINIA TORT CLAIMS ACT AFFORDS THE SOLE REMEDY AND PLAINTIFF CHOSE TO CHALLENGE THE DISCHARGE ON PROCEDURES AVAILABLE TO HIM UNDER LAW ENFORCEMENT OFFICERS PROCEDURAL GUARANTEES AND THIS PROCEDURE PROVIDES THE PLAINTIFFS EXCLUSIVE REMEDY

FOR HIS CLAIM OF WRONGFUL DISCHARGE. HAVING HEARD THE ARGUMENTS OF COUNSEL—

THE COURT: SO YOU'RE—

MR. RAB: —AGAIN, THERE HAVE BEEN A COUPLE OF JUDGES WHO, WHERE THE PLAINTIFF HAS ATTEMPTED TO GET CIRCUIT COURT REVIEW OF THE GRIEVANCE DECISION OR CIRCUIT COURT APPLICATION OF A GRIEVANCE DECISION, HAVE SAID THAT THE SOLE REMEDY FOR PLAINTIFF'S CHALLENGE TO HIS TERMINATION COMES BY THE GRIEVANCE PROCEDURE.

WHAT I'M SAYING IS, A TERMINATED PLAINTIFF WHO IS A STATE WORKER, A CLASSIFIED STATE WORKER, CANNOT COME INTO COURT AND CLAIM THIS COMMON LAW RIGHT OF BREACH OF CONTRACT.

THE COURT: BECAUSE THE STATUTE HAS ABROGATED THAT COMMON LAW RIGHT.

MR.RAB: THAT STATUTE HAS ABROGATED—THE STATUTE CREATED, I THINK, THE ONLY REMEDIES THAT STATE [49] WORKERS HAVE AGAINST THE STATE. REMEMBER THIS IS A SOVEREIGN YOU'RE DEALING WITH. YOU HAVE TO HAVE A STATUTE. THE PLAINTIFF HAS TO HAVE A WAY TO GET INTO A REMEDY OF THE COURT. THIS IS NOT A MATTER THAT THE BURDEN IS ON THE COMMONWEALTH TO SHOW TO NEGATE THINGS. THE BURDEN IS ON THE PLAINTIFF TO SHOW I HAVE A REMEDY BECAUSE THIS IS AGAINST THE SOVEREIGN.

MR. MCGEEHAN WAS TALKING ABOUT THIS PRINCIPLE OF CONTRACT. AND EVERYBODY KNOWS IT SAYS ESSENTIALLY YOU CAN SUE THE COMMONWEALTH FOR BREACH OF THESE CONTRACTS. WELL, WHAT THERE IS IS A RECOGNI-

TION THAT WE HAVE A DUE PROCESS AND DEPRIVATION OF PROPERTY CLAUSE IN THE VIRGINIA CONSTITUTION. I THINK IT'S ARTICLE ONE, SECTION ELEVEN. IT SAYS THAT WE CANNOT TAKE AWAY A PERSON'S PROPERTY OR IMPAIR THE OBLIGATIONS OF CONTRACTS WITHOUT DUE PROCESS. SO THE SUPREME COURT HAS RECOGNIZED THAT WHERE A PARTY COMES INTO COURT AND SAYS, I HAVE A CONTRACT WITH THE STATE, I DELIVERED THE GOODS, I'M ENTITLED TO BE PAID. OR WHEN A PARTY SAYS, MY LAND WAS DAMAGED BY THE STATE. I HAVE BEEN DEPRIVED OF PROPERTY RIGHTS. THE STATE CANNOT ENJOY SOVEREIGN IMMUNITY IN ABROGATION OF THE STATE CONSTITUTION. THAT'S WHERE THIS COMES FROM. SO–

[50] THE COURT: BUT IF THE STATE SETS UP A REMEDY THAT REALLY IS EMPTY AT LEAST WITH RESPECT TO SOME ISSUES, SUCH AS COMPENSATION, THEN ISN'T THAT ESSENTIALLY A DEPRIVATION?

MR. RAB: WELL, IT'S TWO WAYS–I'LL ANSWER THAT. NO, BECAUSE THE ONLY ABROGATION OF THE SOVEREIGN IMMUNITY WITH RESPECT TO STATE WORKERS HAS BEEN THAT THEY THE RIGHTS AND IT'S IN 2.1-116.06, THEY CAN CHALLENGE THE APPLICATION OF ALL WRITTEN PERSONNEL POLICIES, PROCEDURES, RULES AND REGULATIONS WHERE IT CAN BE SHOWN THAT THE POLICY WAS MISAPPLIED OR UNFAIRLY APPLIED. THEY CAN CHALLENGE, IF A GRIEVANCE SAYS THAT I THINK THE POLICY OF THE STATE IS TO PAY THE OVERTIME UNDER THESE CIRCUMSTANCES. THEY CAN GRIEVE THAT. MR. MCGEEHAN IS FORGETTING THAT

THERE IS A WORD IN SECTION C, THE WORD "SOLELY," WHAT IT SAYS IN SECTION C IS COMPENSE (SIC) RELATED SOLELY TO THE FOLLOWING ISSUES SHALL NOT PROCEED TO A HEARING.

IF THIS WAS SOLELY ABOUT WAGES, IT WOULD APPEAR NOT TO BE GRIEVABLE. BUT THE STATE ALLOWS STATE WORKERS TO CHALLENGE IN THIS APPLICATION OF THE POLICIES. I DON'T THINK THAT IN VIRGINIA THERE IS A PROPERTY RIGHT IN A STATE EMPLOYEE TO BE PAID FLSA OVERTIME. DON'T MISS [51] THE TWO CONCEPTS BEING DIFFERENT. WE HAVE PAID THESE PEOPLE OVERTIME. WE'VE PAID THEM OVERTIME, WE HAVE THE STATE PERSONNEL POLICY THAT SAYS THAT CERTAIN WORKERS ARE PAID. WE PAY OVERTIME ALL THE TIME. THE ISSUE IS NOT WHETHER WE SHOULD PAY OVERTIME, IT'S WHETHER THIS WAS WORK.

THEY'RE SAYING THAT THIS ROLL CALL AND HIS HOME WORK WAS WORK. THAT'S THE ISSUE IN THIS CASE. IT'S NOT WHETHER WE'RE OBLIGATED TO PAY OVERTIME, IT'S WHETHER THESE HOURS SHOULD BE ADDED ON. THIS CLAIM IS NOT ABOUT WHETHER THE STATE PAYS OVERTIME. THE STATE HAS NOT BEEN SENDING A MIXED MESSAGE ON THIS ISSUE. THE STATE DOES PAY OVERTIME AS A MATTER OF STATE POLICY, WHEN YOU EXCEED FORTY HOURS IN A WORK WEEK, OR IN SOME CASES WHEN YOU EXCEED A DIFFERENT MAXIMUM BECAUSE THEY'RE POLICE OFFICERS, BUT WE DON'T NEED TO GET INTO THAT HERE. NO, THE ISSUE HERE IN THIS CASE IS WHETHER THESE HOURS ARE HOURS WORKED. THAT'S WHERE THE PLEADING HAS BEEN INCONSISTENT. THEY'VE SAID THAT WE DON'T EVEN

ACCEPT THE PROPOSITION. IT SAYS WE DON'T COUNT UNTIL YOU REPORT THESE HOURS, BECAUSE THEY'RE NOT HOURS WORKED.

SO, NO, I DO NOT THINK WE HAVE EFFECTED A DEPRIVATION OF A PROPERTY RIGHT BECAUSE ALL THESE STATE [52] WORKERS ARE CLAIMING IS THAT WE THINK SOMETHING SHOULD BE CONSIDERED WORK NOT WE HAVE DONE WORK. THERE'S BEEN NO COURT THAT'S DECIDED THAT WHEN MR. DOUGALL CLEANS HIS WEAPON AT HOME AFTER HOURS, OR WHEN HE WRITES A REPORT AFTER HOURS, NO COURT HAS DECIDED THAT THIS IS WORK. THAT REMAINS TO BE DECIDED.

THE COURT: WELL, BUT YOU'RE SAYING IT'S NOT GOING TO BE DECIDED IN THIS CASE.

MR. RAB: I'M SAYING THAT THIS COURT DOES NOT HAVE TO DECIDE WHETHER 2.1-116.06 DOES ENCOMPASS THIS CLAIM BECAUSE IT'S NOT BEFORE THIS COURT ON A GRIEVABILITY ISSUE. THAT'S NOT HERE NOW. I–I WANT TO TAKE ISSUE WITH THE NOTICE THAT YOU–THE NOTION THAT YOU CAN VERBALLY–A STATE EMPLOYEE CAN VERBALLY ASK THE DEPARTMENT OF HUMAN RESOURCES, HE HAS NO DOCUMENT, WHETHER OR NOT THIS IS GRIEVABLE, GET THAT ANSWER, AND CLAIM THAT HE'S EXHAUSTED HIS ADMINISTRATIVE REMEDY. I TAKE ISSUE WITH THAT NOTION.

AGAIN, WE'RE TALKING ABOUT ABROGATION OF THE STATE'S IMMUNITY. YOU HAVE TO EXHAUST A PROCESS, FILE A GRIEVANCE, GET THE GRIEVABILITY ISSUE UP BEFORE A HEARING OFFICER, AND THEN TAKE IT TO A CIRCUIT COURT FOR REVIEW OF THE GRIEVABILITY

ISSUE. THERE'S NO DISPUTE THAT [53] GRIEVABILITY ISSUES ARE REVIEWABLE BY THE CIRCUIT COURT. IT'S CLEAR IN THE STATUTE. SO, IN SUM, I DON'T THINK THIS COURT GETS TO THE ISSUE OF WHETHER OR NOT THERE'S A DEPRIVATION OF DUE PROCESS. I WILL ADD THAT ON NOVEMBER 2ND, 1999, I APPEARED BEFORE THE VIRGINIA SUPREME COURT AND THIS ISSUE HAS BEEN RAISED IN A CASE ENTITLED *LUZIK VERSUS THE COMMONWEALTH*.

THE COURT: THAT'S ONE THAT'S PENDING RIGHT NOW?

MR. RAB: RIGHT. I ARGUED THE APPEAL ON NOVEMBER 2ND. THE SUPREME COURT HAS NOT GIVEN A DECISION. I WOULD CERTAINLY BE HAPPY TO INFORM THIS COURT IF YOU WANTED TO BE KEPT APPRAISED. I DON'T KNOW WHETHER THE SUPREME COURT WILL ADDRESS THE ISSUE. THEY MAY SIMPLY SAY THERE WAS A LACK OF JURISDICTION IN THE TRIAL COURT LEVEL.

THE COURT: WHAT'S THE ISSUE THAT THEY GRANTED–

MR. RAB: IT WAS A PURE FSLA CASE HANDLED BEFORE THE *ALDEN* CASE CAME DOWN AND A JUDGMENT WAS ENTERED AGAINST THE DEPARTMENT OF JUVENILE JUSTICE, MONEY DAMAGES OF ABOUT A QUARTER OF A MILLION DOLLARS FOR FLSA VIOLATIONS. IT WENT UP AND IT WAS BRIEFED ON THE ISSUE [54] OF WHETHER OR NOT VIRGINIA LIKE MAINE ENJOYS SOVEREIGN IMMUNITY. JUDGE STITT RULED THAT VIRGINIA DOES ON THE TRIAL LEVEL.

THE COURT: WELL IS THERE ANY REASON WHY VIRGINIA WOULDN'T BE TREATED LIKE MAINE WOULD BE TREATED?

MR. RAB: THE ARGUMENT WAS MADE BY MY OPPONENT, MICHAEL LEIBIG, WHO'S A FAIRFAX LAWYER AND VERY TALENTED, THAT THERE WOULD BE A DEPRIVATION OF DUE PROCESS BECAUSE THE PROBATION OFFICERS ACTUALLY DID SOME WORK AND THEY WOULDN'T BE PAID FOR THE WORK. SO THAT–THAT ARGUMENT WAS PART OF THE–ARGUMENT ASKING FOR AFFIRMANCE OF THE TRIAL COURT'S JUDGMENT. HE ARGUED IT WAS WORK.

SO WE–WE ARE IN A STATUS OF WAITING FOR THE SUPREME COURT, BUT I'M NOT SO SURE THE SUPREME COURT WILL ARTICULATE THE BASIS, YOU KNOW, IN THAT DETAIL. I DON'T WANT TO PROMISE THIS COURT THAT THERE WILL BE A RULING THAT WILL DISCUSS THAT–

THE COURT: WELL, I'M NOT SURE IF THAT ISSUE–THAT SAME ISSUE IS SQUARELY PRESENTED IN THIS CASE ANYWAY.

MR. RAB: I'M NOT SURE EITHER. I'M TRYING TO BE FULLY IMPLICIT IN TERMS OF THE PRESENTATION. I THINK THIS COURT CAN DECIDE THAT THE VPA HOWEVER INADEQUATE IT [55] MAY APPEAR TO MR. DOUGALL, WHATEVER LIMITATIONS HE OPERATES UNDER, THAT THE VPA AND THE DERC STATUTE ARE THE EXCLUSIVE REMEDY FOR STATE CLASSIFIED WORKERS. THERE'S NO ISSUE BUT THAT MR. DOUGALL AND THE OTHERS ARE STATE CLASSIFIED WORKERS. IT SAYS SO IN THE CODE, WHICH DEFINES CAMPUS POLICE OFFICERS, AND THAT THIS COURT IS NOT GOING TO DECIDE WHETHER OR NOT HE HAD THAT REMEDY.

THIS COURT IS ONLY GOING TO DECIDE THAT THEY CAN'T AVOID THAT REMEDY AND

COME DIRECTLY INTO COURT CLAIMING A BREACH OF CONTRACT. THAT YOU CANNOT HAVE A COMMON LAW CONTRACT BETWEEN THE STATE UNIVERSITY AND STATE WORKERS. I THINK THE COURT CAN MAKE THAT DECISION WITHOUT GETTING INTO THE FULL EXAMINATION OF WHAT I THINK IS AN UNCLEAR OVERLAP BETWEEN 2.1-116.06 A AND B, WHERE IT SAYS YOU CAN CHALLENGE THE APPLICATION OF PERSONNEL POLICIES, BUT THEN IT SAYS WE WON'T HEAR A COMPLAINT SOLELY ABOUT WAGES. WELL, I'M NOT SO SURE THAT MR. DOUGALL'S COMPLAINT IS SOLELY ABOUT WAGES. IT COULD BE ARGUED THAT IT'S ABOUT TIME. HE'S NOT SAYING I'M NOT PAID ENOUGH FOR MY WORK, HE'S SAYING I NEED CERTAIN TIME THAT I WORK TO BE COUNTED AS PAYABLE. SO I THINK THAT ISSUE IS OPEN AND SOME DAY IN ANOTHER FORUM IT WILL BE RAISED AND DECIDED. DO YOU HAVE ANY FURTHER QUESTIONS?

THE COURT: NO.

MR. RAB: I ALSO—I THINK BRIEFED THE ATTORNEY'S FEE ISSUE. I THINK THAT EVEN IF THERE'S A COMMON LAW CONTRACT UNDER WELL ESTABLISHED PRINCIPLES, YOU NEED TO HAVE A STATUTE. YOU NEED TO HAVE A CONTRACT WHICH SAYS THERE WOULD BE ATTORNEY'S FEES OR YOU NEED TO HAVE FRAUD OR BREACH OF FIDUCIARY DUTIES, OTHERWISE THERE CAN BE NO ATTORNEY'S FEES. I THINK ATTORNEY'S FEES CAN BE STRICKEN EVEN IF THE AMENDED BILL SURVIVES.

THE LAST POINT IS IF THE COURT DOES OVERRULE DEMURRERS AND PLEA[illegible] WE WOULD

ASK FOR JANUARY 15TH, 1999 (SIC) TO FILE THE ANSWER AND TO FILE DISCOVERY THAT WE PROMISED BECAUSE THE UNIVERSITY IS CLOSED FOR TWO WEEKS AROUND CHRISTMAS AND I WON'T HAVE THE ASSISTANCE OF THE UNIVERSITY DURING THAT PERIOD.

THE COURT: ALL RIGHT, THANK YOU, MR. RAB.

MR. RAB: I MEANT THE YEAR 2000.

THE COURT: ALL RIGHT, MR. MCGEEHAN, IS THERE ANYTHING ELSE THAT YOU WANT TO SAY?

MR. MCGEEHAN: JUST BRIEFLY, YOUR HONOR. TWO POINTS. ONE, WE DID NOT ANSWER THE PART ABOUT–MAYBE I MISUNDERSTOOD YOUR QUESTION ABOUT ATTORNEY'S FEES. I THOUGHT YOU MEANT WITH REGARD TO THIS MOTION–

[57] THE COURT: OH, NO, I MEANT AS IT RELATES TO YOUR UNDERLYING CLAIM.

MR. MCGEEHAN: WE DIDN'T ANSWER THAT AND WE CONCEDE THAT POINT.

THE COURT: OKAY.

MR. MCGEEHAN: TWO IS I DRAW THE COURT'S ATTENTION TO THE PLAINTIFF'S REBUTTAL MEMORANDUM WHICH WAS FILED ON AUGUST 17TH, PAGES FIVE–PAGE FIVE. WHAT WE DIDN'T–THERE'S TWO POINTS THAT ARE MADE IN THE SECOND FULL PARAGRAPH ON THAT AND THAT IS–

THE COURT: WAIT A SECOND, LET ME MAKE SURE I HAVE THAT.

MR. MCGEEHAN: YES, THE *DOUGALL* CASE, YOUR HONOR.

MR. RAB: PAGE FIVE OF NINE?

MR. MCGEEHAN: FIVE OF NINE.

THE COURT: DO WE HAVE THE REBUTTAL MEMORANDUM? I CAN'T PUT MY FINGER ON IT.

MR. MCGEEHAN: WOULD YOU LIKE TO LOOK AT MY COPY–

THE COURT: YES, DO YOU HAVE A COPY THERE HANDY?

[58] MR. MCGEEHAN: YES. MAY I APPROACH?

THE COURT: YES.

(THEREUPON, COUNSEL DELIVERED THE DOCUMENT TO THE BENCH.)

THE COURT: THANK YOU.

MR. MCGEEHAN: THE POINT MADE IN THAT SECOND FULL PARAGRAPH, IT IS UNDER TITLE TWENTY-THREE OF THE CODE, IT SAYS BOARD VISITORS MAY EMPLOY PEOPLE SUCH AS THE PLAINTIFFS IN THIS CASE UNDER SUCH TERMS AS THEY DETERMINE AS LONG AS THEY ARE NOT INCONSISTENT WITH STATE POLICY, WHICH INDICATES THE ABILITY TO ACTIVELY, IF YOU WILL, ENTER INTO THESE CONTRACTS.

TWO IS IN THE BOTTOM PART WE ARGUE THAT THE ISSUE THAT MR. RAB HAD ARGUED ABOUT WHETHER OR NOT THEY ARE PAID FOR THIS OUTSIDE EMPLOYMENT IS CONSISTENT WITH DPT POLICY. SO THE ISSUE IS–IS THE BURDEN FALLS ON US TO SHOW IN FACT IT IS AN ELEMENT OF THE CONTRACT. IF WE FAIL TO DO SO, WE WON'T RECOVER FOR THAT. IF WE PREVAIL ON DOING SO, BECAUSE WE HAVE ALLEGED IT IS PART OF THE CONTRACT, THEN WE OUGHT TO RECOVER FOR THAT. I HAVE NO FURTHER SUR-REBUTTAL.

THE COURT: ALL RIGHT. THANK YOU, MR. MCGEEHAN. LET ME RETURN THAT TO YOU.

[59] (THEREUPON, COUNSEL RETRIEVED THE DOCUMENT FROM THE BENCH.)

(PAUSE.)

THE COURT: WELL, I'M GOING TO TAKE A SHORT RECESS AND THEN I'LL COME BACK AND EITHER GIVE YOU MY DECISION OR TELL YOU I'M NOT GOING TO GIVE YOU MY DECISION.

(BRIEF BREAK.)

THE COURT: ALL RIGHT, COUNSEL, I AM GOING TO RULE IN THE CASE TODAY. I AM PREPARED TO RULE.

NOW, I'M GOING TO RULE IN THE SAME ORDER IN WHICH THE GROUNDS HAVE BEEN RAISED IN THE DEFENDANT'S DEMURRER AND I'M LOOKING AT THE DEMURRER THAT'S BEEN FILED IN THE *AMBER FOSTER* CASE.

MR. RAB, DID YOU FILE THE SAME PLEADING IN EACH OF THE FOUR CASES?

MR. RAB: YES, THE ONLY THING I DID WAS CHANGE THE PLURAL TO SINGULAR IN THE ONE CASE WHERE THERE WAS ONLY ONE PLAINTIFF.

THE COURT: OKAY.

MR. RAB: I MAY HAVE CHALLENGED JOINDER IN THE CASE WHERE THERE WAS ONLY ONE PLAINTIFF.

THE COURT: ALL RIGHT, I DIDN'T SEE THAT IN THE [60] DEMURRER THAT I WAS LOOKING AT THAT, BUT I WILL ADDRESS THAT TODAY.

ALL RIGHT, I'M GOING TO GO IN THE SAME ORDER THAT THE GROUNDS WERE PRESENTED IN THE DEMURRER IN THE *FOSTER* CASE.

AND MY RULING TODAY IS GOING TO BE DISPOSITIVE, BUT I'LL RULE ON ALL OF THE

GROUNDS ANYWAY, SO YOU'LL HAVE THE RULING.

ALL RIGHT, THE FIRST PARAGRAPH REGARDING THE PRESENTATION OF THE CLAIM TO THE CONTROLLER. THAT GROUND OF DEMURRER IS OVERRULED.

THE SECOND GROUND REGARDING THE VIRGINIA PERSONNEL ACT BEING THE EXCLUSIVE REMEDY, THAT GROUND OF DEMURRER IS SUSTAINED.

THE THIRD PARAGRAPH REGARDING THE STATEMENT OF A CAUSE OF ACTION FOR BREACH OF CONTRACT, THAT GROUND OF DEMURRER IS OVERRULED.

THE FOURTH PARAGRAPH REGARDING SPECIFICITY OF THE TERMS OF THE CONTRACT, THAT GROUND OF DEMURRER IS OVERRULED.

THE PLEA IN BAR, PARAGRAPH FIVE, REGARDING THE IMMUNITY OF THE COMMONWEALTH, THE PLEA IS OVERRULED BECAUSE THE COMMONWEALTH IS NOT IMMUNE FROM SUIT IN [61] CONTRACT, BUT TO THE EXTENT THAT I'VE RULED THAT THE VIRGINIA PERSONNEL ACT IS THE EXCLUSIVE REMEDY, THE PLEA IS SUSTAINED BECAUSE I CONCLUDE THAT THE PLAINTIFF SIMPLY DOES NOT HAVE A CONTRACT ACTION IN THIS CASE.

PARAGRAPH SIX REGARDING THE STATUTE OF FRAUDS, THAT ASSERTION HAS BEEN WITHDRAWN OR AT LEAST DELAYED UNTIL THE TIME OF TRIAL, IF ONE IS EVER HAD IN THIS CASE.

PARAGRAPH SEVEN REGARDING AN ILLEGAL COLLECTIVE BARGAINING CONTRACT, THAT PLEA IS OVERRULED.

NOW WITH RESPECT TO COUNT TWO, PARAGRAPH ONE OF THE DEMURRER IS OVERRULED. PARAGRAPH TWO OF THE DEMURRER IS SUSTAINED. PARAGRAPH THREE OF THE DEMURRER IS OVERRULED. PARAGRAPH FOUR REGARDING THE IMMUNITY OF THE COMMONWEALTH, IT'S THE SAME RULING. PARAGRAPH FIVE REGARDING THE STATUTE OF FRAUDS, THE SAME RULING. PARAGRAPH SIX REGARDING THE ILLEGALITY OF THE CONTRACT, THAT PLEA IS OVERRULED.

LET ME ALSO DEAL WITH THE MOTION TO STRIKE JUST SO THE RULING IS COMPLETE. THE MOTION TO STRIKE WITH RESPECT TO PARAGRAPH ONE IS DENIED TO THE EXTENT THE FACTUAL ALLEGATIONS ARE CONTAINED IN PARAGRAPH NINE, ELEVEN, TWELVE, THIRTEEN AND FIFTEEN RELATE TO THE CLAIM, I'M NOT GOING TO STRIKE THEM. THE PLAINTIFF, HOWEVER, [62] UNDERSTANDS HOW IT'S LIMITED IN ITS ABILITY TO RECOVER.

THE MOTION TO STRIKE THE REQUEST FOR ATTORNEY'S FEES IN PARAGRAPH TWO IS SUSTAINED. THE MOTION TO STRIKE IN PARAGRAPH THREE REGARDING, I GUESS THIS IS YOUR AD DAMNUM COMPLAINT, THAT'S OVERRULED, TO THE EXTENT THE PLAINTIFFS CAN SHOW DAMAGES, THEY CAN SPECIFY THOSE IN THE COURSE OF DISCOVERY.

AND THE CLAIM WITH RESPECT TO MISJOINDER IS OVERRULED WITHOUT PREJUDICE. I THINK THE PARTIES WERE PROPERLY JOINED AT THE TIME THE SUIT WAS FILED. FOR THE SAKE OF JUDICIAL ECONOMY I'M NOT GOING TO MISJOIN THEM AT THIS POINT. AND IT MAY

BE THAT THEY DON'T HAVE TO BE MISJOINED AT ANY POINT, BUT CERTAINLY THE DEFENDANT IS FREE TO RAISE THE ISSUE AGAIN IF— IF THE CASES PROCEED TO TRIAL.

NOW, LET ME SAY A COUPLE OF THINGS ABOUT MY DISPOSITIVE RULING TODAY, AND THAT IS THAT I'VE CONCLUDED THE VIRGINIA PERSONNEL ACT IS THE EXCLUSIVE REMEDY FOR THESE PLAINTIFFS. I THINK THERE ARE WAYS IN WHICH THESE QUESTIONS CAN PROPERLY BE PLACED BEFORE THE COURT. ONE IS A REVIEW OF THE ISSUE OF GRIEVABILITY. ANOTHER MAY BE AN ALLEGATION OF THE CONSTITUTIONAL DEPRIVATION. HOWEVER, THAT IS NOT THE STATUS OF THIS CASE, AT LEAST [63] NOT TODAY.

THE VIRGINIA PERSONNEL ACT I CONCLUDE DOES ABROGATE WHATEVER COMMON LAW RIGHT TO SUE ON A CONTRACT THAT A STATE EMPLOYEE MAY HAVE EVER HAD, IF THERE EVER WAS ONE. SO THE PLAINTIFFS ARE GOING TO HAVE TO FIND SOME OTHER WAY TO GET INTO COURT OR ARE GOING TO HAVE TO ALLEGE SOME OTHER GROUND.

SO TO THE EXTENT I HAVE SUSTAINED THAT DEMURRER, MR. MCGEEHAN, YOU MAY HAVE LEAVE TO AMEND, IF YOU WANT LEAVE TO AMEND. I DON'T KNOW WHAT YOUR THOUGHT IS ABOUT IT, BUT WHY DON'T I LEAVE IT THIS WAY. THE PLAINTIFF MAY HAVE TWENTY-ONE DAYS WITHIN WHICH TO AMEND. THE FAILURE OF THE PLAINTIFF TO AMEND WITHIN TWENTY-ONE DAYS WOULD MEAN THAT THE SUIT WOULD BE DISMISSED WITH PREJUDICE.

MR. MCGEEHAN: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT–

MR. RAB: HOW DO YOU WANT US TO PREPARE THIS? CAN WE WAIT FOR THE REPORTER?

THE COURT: WELL, I WOULD LIKE TO ENTER AN ORDER TODAY. YOU CAN CERTAINLY SUPPLEMENT THE ORDER WITH A COPY OF THE TRANSCRIPT, IF YOU'D LIKE TO DO THAT, BUT I DO WANT TO ENTER AN ORDER IN EACH CASE TODAY SO THAT THE [64] FILE IS COMPLETE.

MR. RAB: I'LL USE THE SKETCH ORDER, AND I'LL PUT THE FOUR NUMBERS ON IT AND, OF COURSE, IT COULD BE–

THE COURT: I'LL NEED ONE FOR EACH FILE UNFORTUNATELY–

MR. RAB: ONE FOR EACH–

THE COURT: –SO–BUT WE HAVE PLENTY OF FORMS HERE. THE DEPUTY CAN HAND THEM TO YOU AND I'LL ASK YOU TO PLEASE FILL IT OUT LEGIBLY AND IN BLACK INK.

MR. RAB: OKAY.

THE COURT: ALL RIGHT, DOES THAT–DOES THAT RESOLVE THE MATTERS BEFORE THE COURT TODAY?

MR. RAB: YES.

MR. MCGEEHAN: YES, YOUR HONOR.

THE COURT: ALL RIGHT, THANK YOU ALL FOR APPEARING. WE'LL BE IN RECESS.

(THEREUPON AT 11:40 A.M., THE HEARING IN THE ABOVE-ENTITLED MATTER WAS CONCLUDED.)

CERTIFICATE OF REPORTER

I, SANDRA J. LANG, DO HEREBY CERTIFY THAT I TOOK THE AUDIOGRAPHIC NOTES OF THE FOREGOING PROCEEDINGS AND THE SAME WERE REDUCED TO TYPEWRITING UNDER MY DIRECTION; THAT THE FOREGOING IS A TRUE RECORD OF SAID PROCEEDINGS; THAT I AM NEITHER RELATED TO NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION HEREIN; AND, FURTHER, THAT I AM NOT A RELATIVE OR EMPLOYEE OF ANY ATTORNEY OR COUNSEL OR EMPLOYED BY THE PARTIES THERETO, NOR FINANCIALLY OR OTHERWISE INTERESTED IN THE ACTION.

/s/ Sandra J. Lang

Supreme Court, U.S.
FILED
OCT 11 2000
CLERK

(3)

No. 00-349

In The

Supreme Court of the United States

CRAIG SCOTT DOUGALL, *et al.*,

Petitioners,

v.

THE RECTOR AND VISITORS OF GEORGE MASON UNIVERSITY

and

THE COMMONWEALTH OF VIRGINIA,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION

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Attorney General of Virginia

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QUESTIONS PRESENTED

1. Must the Commonwealth of Virginia, which has not waived immunity from Fair Labor Standards Act suits by state workers, provide state workers with a further remedy than the Virginia Personnel Act?

2. Does the right to receive pay for disputed hours claimed to be overtime hours constitute a "property right" protected from deprivation by the Fourteenth Amendment?

3. As Virginia has waived sovereign immunity for certain contract actions against the Commonwealth, must she also waive immunity for claims upon employment contracts for overtime pay by employees covered by the Virginia Personnel Act?

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STATEMENT OF JURISDICTION

The Petitioners ("Police Officers" or "Officers") did not present an issue of federal law or Constitutional due process before the trial court or the state's appellate court. There was not an allegation of constitutional deprivation in the lawsuit filed. The Petitioners' "Questions Presented" to the Va. Supreme Court were precisely: "1. Is the Commonwealth immune as to contract claims relating to contract rights created by express agreements, course of dealing, and statute? 2. Is the Commonwealth's employee grievance procedures the exclusive procedure for contract claims concerning wages?" Neither the trial judge nor the Virginia Supreme Court issued a written opinion on the substance of the issues that the Officers seek to raise. For these reasons, jurisdiction is lacking.

STATUTORY PROVISIONS

TITLE 2.1. ADMINISTRATION OF THE GOVERNMENT GENERALLY CHAPTER 10.01. THE DEPARTMENT OF EMPLOYEE RELATIONS COUNSELORS

Va. Code Ann. § 2.1-116.05

(1998)

§ 2.1-116.05. Grievance procedure generally

A. It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees must be able to freely, and without retaliation, discuss their

concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.1-116.09.

B. As part of the Commonwealth's program of employee relations management, the Department shall develop a grievance procedure that includes not more than three successively higher grievance resolution steps and a formal hearing as provided in this chapter.

C. Prior to initiating a written grievance, the employee shall be encouraged to pursue an informal complaint with his immediate supervisor. The supervisor shall have authority to resolve the complaint if it involves actions within his control.

D. An employee may pursue a formal written grievance through the grievance resolution steps if the complaint has been presented to management within thirty calendar days of the employee's knowledge of the event that gave rise to the complaint. Employees' rights to pursue grievances shall not be used to harass or otherwise impede the efficient operations of government.

E. Upon receipt of a timely written complaint, management shall review the grievance and respond to the merits thereof. Each level of management review shall have the authority to provide the employee with a remedy. At least one face-to-face meeting between the employee and management shall be required. The persons who may be present at this meeting are the

employee, the appropriate manager, an individual selected by the employee, and an individual selected by the manager. Witnesses may be called by either party.

F. Pursuant to § 2.1-342 B 3 of the Virginia Freedom of Information Act and § 2.1-382 of the Virginia Privacy Protection Act of 1976, all information relating to the actions grieved shall be made available to the employee by the agency, except as otherwise provided by law. Information pertaining to other employees that is relevant to the grievance shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the complaint or dispute.

G. All time limitations prescribed in the grievance procedure, including, but not limited to, submission of an initial complaint and employee appeal of management decisions, shall be reasonable, specific, and equally applicable to the agency and the employee. Expedited grievance procedures shall be established for terminations, demotions, suspensions, and lost wages or salaries.

H. Within five workdays of the receipt of a written notice of noncompliance, failure of the employee or the agency to comply with a substantial procedural requirement of the grievance procedure without just cause may result in a decision against the noncomplying party on any qualified issue. Written notice of noncompliance by the agency must be made to the agency head. The Director shall render all decisions related to procedural compliance, and such decisions shall be final.

I. Grievances qualified pursuant to § 2.1-116.06 that have not been resolved through the grievance resolution

steps shall advance to a hearing which shall be the final step in the grievance procedure.

Va. Code Ann. § 2.1-116.06

(1998)

§ 2.1-116.06. Grievances qualifying for a grievance hearing; grievance hearing generally

A. A grievance qualifying for a hearing shall involve a complaint or dispute by an employee relating to the following adverse employment actions in which the employee is personally involved, including but not limited to: (i) formal disciplinary actions, including suspensions, demotions, transfers and assignments, and dismissals resulting from formal discipline or unsatisfactory job performance; (ii) the application of all written personnel policies, procedures, rules and regulations where it can be shown that policy was misapplied or unfairly applied; (iii) discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin or sex; (iv) arbitrary or capricious performance evaluations; (v) acts of retaliation as the result of the use of or participation in the grievance procedure or because the employee has complied with any law of the United States or of the Commonwealth, has reported any violation of such law to a governmental authority, has sought any change in law before the Congress of the United States or the General Assembly, or has reported an incidence of fraud, abuse, or gross mismanagement; and (vi) retaliation for exercising any right otherwise protected by law.

B. Management reserves the exclusive right to manage the affairs and operations of state government. Management shall exercise its powers with the highest degree of trust. In any employment matter that management precludes from proceeding to a grievance hearing, management's response, including any appropriate remedial actions, shall be prompt, complete, and fair.

C. Complaints relating solely to the following issues shall not proceed to a hearing: (i) establishment and revision of wages, salaries, position classifications, or general benefits; (ii) work activity accepted by the employee as a condition of employment or which may reasonably be expected to be a part of the job content; (iii) contents of ordinances, statutes or established personnel policies, procedures, and rules and regulations; (iv) methods, means, and personnel by which work activities are to be carried on; (v) termination, layoff, demotion, or suspension from duties because of lack of work, reduction in work force, or job abolition; (vi) hiring, promotion, transfer, assignment, and retention of employees within the agency; and (vii) relief of employees from duties of the agency in emergencies.

D. Decisions regarding whether a grievance qualifies for a hearing shall be made in writing by the agency head or his designee within five workdays of the employee's request for a hearing. A copy of the decision shall be sent to the employee. The employee may appeal the denial of a hearing by the agency head to the Director. Upon receipt of an appeal, the agency shall transmit the entire grievance record to the Department within five workdays. The Director shall render a decision on

whether the employee is entitled to a hearing upon the grievance record and other probative evidence.

E. Proceedings for review of the decision of the Director may be made by an employee filing a notice of appeal within five workdays of receipt of the decision. Within five workdays thereafter, the agency shall transmit to the clerk of the circuit court in the jurisdiction in which the grievance arose a copy of the grievance record. The court, on motion of the grievant, may issue a writ of certiorari requiring the Director to transmit the record on or before a certain date. Within thirty days of receipt of such records, the court, sitting without a jury, shall hear the appeal on the record and such additional evidence as may be necessary to resolve any controversy as to the correctness of the record. The court, in its discretion, may receive such other evidence as the ends of justice require. The court may affirm the decision of the Director or may reverse or modify the decision. The decision of the court shall be rendered no later than the fifteenth day from the date of the conclusion of the hearing. The decision of the court is final and is not appealable. The circuit court hearing shall be at no cost to the Commonwealth or the grievant.

F. The hearing pursuant to § 2.1-116.07 shall be held in the locality in which the employee is employed or in any other locality agreed to by the employee, employer, and hearing officer. The employee and the agency may be represented by legal counsel or a lay advocate, the provisions of § 54.1-3904 notwithstanding. The employee and the agency may call witnesses to present testimony and be cross-examined.

Va. Code Ann. § 2.1-116.07

(1998)

§ 2.1-116.07. Hearing officers; duties; decisions; costs

A. The Director shall assign a hearing officer to conduct the grievance hearing. All hearing officers shall be selected, on a rotating basis, from the list of administrative hearing officers maintained by the Supreme Court of Virginia pursuant to § 9-6.14:14.1. In addition to the training requirements imposed by the Supreme Court, each hearing officer shall attend annually at least one day of training in employment law or state personnel policies and organizations. Such training shall be conducted by the Department or an organization approved by the Virginia State Bar for continuing legal education.

B. Hearing officers shall have the following powers and duties:

1. Hold conferences for the settlement or simplification of issues;

2. Dispose of procedural requests;

3. Issue orders requiring testimony or the production of evidence;

4. Administer oaths and affirmations;

5. Receive probative evidence; exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttals, or cross-examinations; rule upon offers of proof; and oversee an accurate verbatim recording of the evidence;

6. For those issues qualified for a hearing, order appropriate remedies. Relief may include reinstatement,

back pay, full reinstatement of fringe benefits and seniority rights, or any combination of these remedies; and

7. Take other actions as necessary or specified in the grievance procedure.

C. The decision of the hearing officer shall (i) be in writing, (ii) contain findings of fact as to the material issues in the case and the basis for those findings, and (iii) be final and binding if consistent with law and policy. In grievances initiated by state employees, the Director of the Department of Personnel and Training shall determine whether the decision is consistent with policy. The hearing officer's decision is effective from the date issued and shall be implemented immediately unless circumstances beyond the control of the agency delay such implementation.

D. Either party may petition the circuit court having jurisdiction in the locality in which the employee is employed for an order requiring implementation of the hearing officer's decision. The court may award attorneys' fees to either party if such party substantially prevails on the merits of the case and the opposing party's position is not substantially justified, unless special circumstances would make an award unjust.

E. Except for the employee's counsel or advocate fees, the agency from which the grievance arises shall bear the costs for the hearing officer and other associated hearing expenses.

TITLE 8.01 CIVIL REMEDIES AND PROCEDURE
CHAPTER 3 ACTIONS, §§ 25 - 227.3 ART. 18
RECOVERY OF CLAIMS AGAINST THE
COMMONWEALTH OF VIRGINIA

§ 8.01-192. How claims to be prosecuted.

When the Comptroller or other authorized person shall disallow, either in whole or in part, any such claim against the Commonwealth as is provided for by §§ 2.1-223.1, 2.1-223.3 or 8.01-605 at which time a right of action under this section shall be deemed to accrue, the person presenting such claim may petition an appropriate circuit court for redress. (Code 1950, § 8-752; 1966, c. 452; 1977, c. 617.Virginia Code § 8.01-192)

§ 8.01-193. Defense and hearing.

In every such case, the Comptroller shall be a defendant. He shall file an answer stating the objections to the claim. The cause shall be heard upon the petition, answer, and the evidence. (Code 1950, § 8-753; 1977, c. 617.)

REASONS FOR DENYING WRIT

The Police Officers of the George Mason University ("the University"), all salaried, classified state employees covered by Virginia's grievance procedure, sued the University to collect additional pay above and beyond their salaries. Each sought to employ the Fair Labor Standards Act in a private lawsuit not constitutionally permitted against a non-consenting state.

The Petitioners are simply wrong about whether Virginia is a consenting state. The University is an agency of

the Commonwealth and enjoys the same immunity. Amended Motion for Judgment at 2 (Appended hereto). The matter of Virginia's preservation of sovereign immunity in FLSA claims was settled with the Va. Supreme Court's decision in *Commonwealth v. Luzik*, 259 Va. 198, 524 S.E.2d 871 (2000) which directly addressed the issue. Petitioners are making an argument about Virginia's amenability to suits for breach of contract, which as a general proposition cannot be disputed. Where a contract with the state has been formed, the contractor may benefit from the State's waiver of immunity. But to do so, one must follow the statutory procedural requirements. Additionally, the contract must be enforceable and not precluded by the existence of a statutory recourse.

Petitioners did not preserve contractual claims, as they failed, despite the grant of leave to amend, to add the Comptroller of Virginia as defendant as is mandated by Va. Code § 8.01-193. This is a matter of settled Virginia law. The Virginia Court ruled in *Ruby C. Harris v. Prince B. Woodard, Lewis M. Walker, and The Rector and Visitors of Mary Washington College*[1], that where "from the face of the pleadings the appellant did not proceed in accordance with applicable Code provisions for relief against the Commonwealth, *See* §§ 2.1-223.1, *et seq.* and Code § 8.01-193, . . . there exists a fatal jurisdictional defect[ ]."[2] The statute is very strict: "the Comptroller shall be a defendant." Such represents an abrogation of sovereign immunity to be narrowly construed. *See also Commonwealth v. Holland*, 211 Va. 530, 178 S.E.2d 506 (1971);

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[1] Record No. 810363, September 9, 1983.

[2] The parties on appeal had not even briefed the issue.

Medicenter of America, Inc. v. Commonwealth of Virginia, 373 F. Supp. 305 (E.D. Va. 1974); *Mendenhall v. Douglas L. Cooper, Inc.*, 239 Va. 71, 74, 387 S.E.2d 468, 470 (1990) (the trial court is without jurisdiction and powerless to proceed "unless all necessary parties are properly before the court.").

The Officers ignore that a "property interest" as the Fourteenth Amendment protects must be an established interest defined by existing rules of state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Detweiler v. Commonwealth of Virginia Dept. of Rehabilitative Services*, 705 F.2d 557, 558 (4th Cir. 1983). On the theory that such hours are "hours of work", they claim pay for time spent writing police reports at home, for time spent for weapon or uniform maintenance, for travel between campuses, and other periods. However important these tasks may be, the complaint does not concern a "property interest" but rather a "unilateral expectation". *Compare Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (Prejudgment garnishment of wages is taking of property without due process) *with Biser v. Town of Bel Air*, 991 F.2d 100 (4th Cir. 1993) (No property interest in a "special exemption" before it is granted by the Board, given the local agency's significant discretion to determine whether to so issue.) The University is not failing to pay the Officers' usual expected salary. The University has a policy and the policy does not call for such hours to be compensated. See Amended Motion for Judgment, paragraphs 4-11. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it." *Roth, supra* at 577.

The "property interest in continued public employment" is recognized. *Garraghty v. Commonwealth of Va. Dept. of Corrections*, 52 F.3d 1274, 1282 (4th Cir. 1995). But in the event of a "downsizing" in State employment, that interest surrenders to the needs of the democratic process of government and the individual's position may be abolished. *Mandel v. Allen*, 81 F.3d 478 (4th Cir. 1996).

The Virginia Supreme Court has answered the question of whether state workers must be afforded access to the courts to address FLSA wage and hour complaints. The issue is "not one of the avoidance of a just contract debt, but of the preservation of a right reserved to the states by the United States Constitution." *Commonwealth v. Luzik*, 259 Va. 198, 208, 524 S.E.2d 871 (2000). Moreover, the Court rejected the

> novel theory [that] rests on the faulty premise that the complainants' entitlement to an award of damages as prescribed by the FLSA for the Commonwealth's alleged failure to comply with the Act's overtime provisions accrues independent of the complainants' ability to maintain and prevail in an action for those damages.

Id. Earlier, the Court had found no constitutional issue to be involved: "The federal constitution 'must not be trivialized by being dragged into every personnel dispute in state and local government. Disputes over overtime . . . do not implicate the great objects of the Fourteenth Amendment.' " *Buchanan v. City of Chesapeake*, 237 Va. 50, 53, 375 S.E.2d 736 (1989), *quoting from Brown v. Brienen*, 722 F.2d 360, 365 (7th Cir. 1983).

The Officers submit that the Commonwealth has not always asserted sovereign immunity and has permitted

suits for breach of contract *and therefore, no immunity lies as to actions which sound in contract.* This reasoning is precisely what the Virginia Supreme Court spurned earlier this year. See *Luzik*, 259 Va. at 207. (Rejecting the proposition that the waiver in Va. Code § 8.01-192 "should be broadly construed to act as a general waiver whenever the remedy sought might be characterized as a claim for a debt owed under a contractual relationship regardless of the nature of the proceeding in which the claim is brought or the theory advanced to assert that claim.") See *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (the Court "will find waiver only where stated 'by the most express language or by overwhelming implications from the text as [will] leave no room for any other reasonable construction.' ") (Internal citation omitted.)

The trial Judge recognized the exclusivity of the Personnel Act as a remedy for classified state workers. "The plea is overruled because the Commonwealth is not immune from suit in contract, but to the extent that the Virginia Personnel Act is the exclusive remedy, the plea is sustained because I conclude that the plaintiff simply does not have a contract action in this case." Appendix to Petition at 66a. The Officers did not exhaust the remedy of the Personnel Act; they gave up without completing the grievance form.

It should also be recognized that the Officers have not been deprived of the FLSA remedy in the form of a lawsuit by the federal government on their behalf. *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240, 2269 (1999).

In summary, the Police Officers have an unresolved expectation that they might be owed more pay. They were

not permitted to sue for money damages for violation of the federal FLSA because of Virginia's immunity from such actions. They never did meet all of the statutory preconditions to maintaining a suit against the Commonwealth for breach of contract, as they failed to name the proper Defendant. They were unwilling to test the words of discouragement they attribute to a single University official and actually assert the claim that the University had violated state policy in the state grievance process – a process which provides for judicial review on matters of grievability. See Va. Code § 2.1-116.06 (providing for grievance of "the application of all written personnel policies, procedures, rules and regulations where it can be shown that policy was misapplied or unfairly applied."). And under state law, the Personnel Act is an exclusive and preclusive remedy.[3]

The Virginia Attorney General represented to the trial court last December that the question of grievability of FLSA matters was unresolved. Appendix to Petition at 22a. A question unexplored, rather than a remedy denied. In the ensuing months the Attorney General has urged the Dept. of Employee Relations Counselors (now the Dept. of Employee Dispute Resolution) to certify FLSA policy compliance issues raised by state workers as grievable, because they are controversies not "solely" about wages. State policy (including an Executive Order dated September 3, 1999) and practice will include the remedy

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[3] The excerpted statutes contain the 1998 text without the 1999 and 2000 Amendments. Those Amendments expanded the procedural avenue of redress for state workers.

of back pay available under the statute. There is absolutely no reason for this Court to review the question of Virginia's affording state workers constitutional "due process" under the facts in this case.

The Petitioner's argument that "the Virginia Personnel Act only provides Petitioners a complaint to supervisors but explicitly bars any hearing on Petitioner's unpaid wage claims" (Petition at 7) is either uninformed or false. The question of whether a matter may be grieved or not is open to judicial review. Va. Code § 2.1-116.06 D and E. And the substance of a grievance is submitted for a full hearing upon all evidence in front of an administrative hearing officer. Va. Code § 2.1-116.07.

CONCLUSION

Because the Officers present a complaint that depends upon an interpretation of state law, and not federal constitutional law, the jurisdictional basis for this Petition is lacking. Because the procedural posture of the Officer's claim has been compromised by the failure to join a needed defendant, the case is a poor one for this Court to select to hear. Because no "property interest" is involved, this claim of deprivation is wholly without merit.

Respectfully submitted,

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Attorney General of Virginia

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APPENDIX

IN VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

CRAIG SCOTT DOUGALL, and other current police officers similarly situated,	)	
Plaintiffs,	)	
v.	)	
THE RECTOR AND VISITORS OF GEORGE MASON UNIVERSITY,	)	**At Law No. 178905**
and	)	
THE COMMONWEALTH OF VIRGINIA	)	
Defendants.	)	

AMENDED MOTION FOR JUDGMENT

(Filed Sep. 16, 1999)

COMES NOW Plaintiff Craig Scott Dougall, on behalf of himself and other police officers similarly situated, in and for his Amended Motion for Judgment for declaratory relief, and damages, against George Mason University, and states:

1. Plaintiff is a current employee of George Mason University. He is a police officer. Those similarly situated are current employees of George Mason University as police officers in the campus police department. They

have issues and violations of law and contract in common, and their complaints involve factually similar events to Plaintiff. The duties of Plaintiff and other police officers similarly situated are to police and patrol the three (3) campuses of and for George Mason University. Attached hereto as exhibit 1 is a list of those similarly situated police officers who consent to this action.

2. Defendant Rector and Visitors of George Mason University is a corporate body established by Virginia statute, Title 23, Chapter 9.1, Sections 23-91.24 *et seq.* of the Code of Virginia (1950), as amended, and is an agency of Defendant Commonwealth of Virginia. Defendants are hereinafter referred to as "GMU." The head of GMU is Alan Merten, its President. GMU controls and expends the funds of George Mason University, directs the affairs of George Mason University, makes all needful rules and regulations concerning George Mason University, appoints the president, all professors, teachers, staff members, agents, and employees and fixes their salaries and terms and conditions of employment. GMU established its campus police department pursuant to Title 23, Chapter 17, Sections 23-232 *et seq.* of the Code of Virginia (1950), as amended.

3. Pursuant to its authority to provide for the conditions and terms of employment and compensation for those employed by the campus police department, GMU contracted for the employment of Plaintiff and other police officers similarly situated. The material terms to that contract are that Plaintiff and other police officers similarly situated would be compensated at an hourly rate for all hours worked during a work period that do not exceed a base number of hours, either forty (40) hours

per one (1) week work period or eighty (80) hours per two week work period. Plaintiff and other police officers similarly situated would be compensated for overtime compensation, payment at the [sic] one and one half times the hourly rate, for any time worked in excess of the base number of hours during a work period. Plaintiff and other police officers similarly situated would be paid twice a month.

4. Since Plaintiff and other police officers similarly situated have been employed by GMU and despite the employment contract with GMU, GMU knowingly did not to [sic] compensate Plaintiff and other police officers similarly situated for all worked [sic] performed at the request, knowledge and/or benefit to GMU. GMU stated both orally and in writing its policy was not to compensate Plaintiff and other police officers similarly situated for all time worked prior to the beginning or [sic] any work day or shift, nor to compensate Plaintiff and other police officers similarly situated for all time worked after the work day or shift ended or for work performed outside the normal day or shift.

5. Included in the time worked but knowingly, willfully and intentionally not compensated by GMU was roll call of fifteen (15) minutes prior to the beginning of each shift (day of work). "Roll call" is, *inter alia*, when sergeants informed his or her squad concerning updates, criminal activities, activities or events at GMU, internal policies and procedures, and patrol issues. Such activity is an integral part of GMU's activities, occurred during a substantial portion of Plaintiff's activities, was required by GMU, was on the GMU's premises, but GMU required this work not to be reported as on duty time. GMU's

failure to compensate Plaintiff and other police officers similarly situated has been continuous since Plaintiff and other police officers similarly situated began their employment with GMU. The beginning dates of employment are shown on Exhibit 1. Plaintiff and other police officers similarly situated understood from GMU's statement that they were not to report any of this time worked.

6. Included in the time worked and knowingly, willfully and intentionally not compensated by GMU is when GMU knew and/or required Plaintiff and other police officers similarly situated to work at home. Such work approximated two-tenths (0.2) of an hour once a week for police officers, and twice a week for higher ranking officers. Such work involved scheduling changes in shifts, discussing cases with superiors, attorneys for accused persons, and Commonwealth Attorneys, and investigating cases when witnesses were available. Such work is substantial and significant and involves activity which is an integral part of GMU's activities, occurred during a substantial portion of Plaintiff's activities, was required by GMU, but was required not to be reported as on duty time or if it was reported it was reduced by GMU. GMU's failure to compensate Plaintiff and other police officers similarly situated for this work has been continuous since Plaintiff and other police officers similarly situated began their employment with GMU. Plaintiff and other police officers similarly situated understood from GMU's statement that they were not to report any of this time worked.

7. Included in the time but knowingly, willfully and intentionally not compensated by GMU is when

GMU knew and/or required Plaintiff and other police officers similarly situated to work on average of fifteen (15) minutes before roll call. Such work involved normal police duties such as checking equipment and weapons such as radios, battery, weapons and ammunition for operational capability and safety concerns, providing maintenance for weapons and uniforms, checking electronic, voice, inter-office and regular mail for discussion at roll call, and completing paperwork, notes, other department forms or time sheets prior to the beginning of roll call. Such work is substantial and significant and involves activity which is an integral part of GMU's activities, occurred during a substantial portion of Plaintiff's activities, was required by GMU, was on the GMU's premises, but was required not to be reported as on duty time. GMU's failure to compensate Plaintiff and other police officers similarly situated has been continuous since Plaintiff and other police officers similarly situated began their employment with GMU. Plaintiff and other police officers similarly situated understood from GMU's statement that they were not to report any of this time worked.

8. Included in the time but knowingly, willfully and intentionally not compensated by GMU is when GMU knew and/or required Plaintiff and other police officers similarly situated to work an additional one and one half hours (1.5) per week while attending the police academy. Such activity included traveling from the academy to the main campus to review general orders under a supervisor's direction and to have work assignment reviewed by supervisors. Such work is substantial and significant, involves normal police activity, is an integral

part of GMU's activities, occurred during a substantial portion of Plaintiff's activities, was required by GMU, was done on and off GMU's premises, but was required not to be reported as on duty time. GMU's failure to compensate Plaintiff and other police officers similarly situated has been continuous since Plaintiff and other police officers similarly situated began their employment with GMU. Plaintiff and other police officers similarly situated understood from GMU's statement that they were not to report any of this time worked.

9. Included in the time but knowingly, willfully and intentionally not compensated by GMU is when GMU knew and/or required Plaintiff and other police officers similarly situated to work on average of fifteen (15) minutes after the conclusion of a shift (day of work). Such work is substantial and significant and involves normal police duties such as checking equipment and weapons such as radios, batteries, weapons and ammunition for operational capability, providing maintenance for weapons and uniforms, checking electronic, voice, inter-office and regular mail for discussion at roll call, and completing paperwork, notes, other department forms or time sheets after the conclusion of a shift. Additionally, such work was required to ensure a proper transition from shift to shift and brief command on events of the shift. Such activity is an integral part of GMU's activities, occurred during a substantial portion of Plaintiff's activities, was required by GMU, was on the GMU's premises, but was required not to be reported as on duty time. GMU's failure to compensate Plaintiff and other police officers similarly situated has been continuous since Plaintiff and other police officers similarly situated began

their employment with GMU. Plaintiff and other police officers similarly situated understood from GMU's statement that they were not to report any of this time worked.

10. GMU knowingly failed to pay Plaintiff and other police officers similarly situated for milage [sic] incurred on tasks or work performed at the request or benefit to the GMU. Such milage [sic] was incurred by Plaintiff and other police officers similarly situated when the GMU ordered them to another campus when they were at home (telephonically) or between shifts, or at roll call. Plaintiff and other police officers similarly situated were required first to report to the main or Fairfax Campus, then to the other campuses, pick up equipment and weapons, and travel in their own vehicles to the other campuses. This was incurred at the request, convenience of and for the interest of the GMU.

11. Since and during periods when Plaintiff and other police officers similarly situated began their employment with GMU and despite the employment contract with GMU, GMU knowingly did not to [sic] compensate Plaintiff and other police officers similarly situated for lunch periods in which Plaintiff and other police officers similarly situated were required to be ready or on-call to work.

12. In addition to the terms of the employment contract, GMU is required to comply with all state and federal wage and hour laws and regulations. The GMU knowingly did not comply with those state and federal wage and hour laws by failing to compensate Plaintiff and other police officers similarly situated for all work

performed for GMU, nor compensate Plaintiff and other police officers similarly situated at the correct rate of pay.

13. GMU willfully and intentionally did not fully compensate Plaintiff and other police officers similarly situated because it was using the money for its benefit and for other than wages. Further, GMU without any good faith basis, denied claims of compensation despite Plaintiff's assertion of his rights. The failure to compensate Plaintiff and other police officers similarly situated in accordance with the terms of his employment contract was knowing and willful.

14. GMU was given a reasonable opportunity to investigate and rectify Plaintiff's wage and hour claims. Thereafter, GMU attempted to make it appear it had complied with the terms of the contract and/or state and federal laws and regulations. This was after Plaintiff and other police officers similarly situated initiated a complaint with the university's equity office and the Department of Labor. Even then, GMU failed to pay what was owed, e.g. statutory liquidated damages and overtime for a third year.

15. The first attempt was in March 1998, when GMU unilaterally sent them money and a letter. The letter stated in a manner intended to mislead that this was the amount GMU owed after the university concluded its review. It falsely stated the error was unintentional and the letter was designed to mislead the officers into abandoning their right to statutory liquidated damages and a third year of overtime, because of a willful violation of the wage and hour law.

16. The second attempt was in January 1999, after an attorney was employed by the workers. By making an additional payment, GMU has admitted that its March statements were false and willful. Even then, however, the January 1999 payment failed to pay statutory liquidated damages and reasonable attorney's fees.

17. Because the GMU would not provide Plaintiff and other police officers similarly situated complete information concerning his time and attendance until December 1998, Plaintiff and other police officers similarly situated are not fully aware of the nature and extent of their claims. To this date Plaintiff and other police officers similarly situated can provide a reasonable approximation of compensation due. Only by discovery can the extent of Plaintiff and other police officers similarly situated damages be precisely ascertained.

18. GMU continues to violate the terms and conditions of Plaintiff and other police officers similarly situated employment contract with GMU, the terms and conditions of Plaintiff and other police officers similarly situated and GMU's agreement concerning working for outside entities or organizations, and state and federal laws and regulations.

19. In addition to the above wage issues, GMU facilitated and otherwise affected the separate and independent employment of Plaintiff and other police officers similarly situated. GMU told or otherwise informed Plaintiff and other police officers similarly situated that the hourly rate of pay for this separate and independent employment was $25.00 per hour. GMU advertised this

separate and independent employment, took no administrative fee, took on the responsibility of proper recording of the amount of hours worked by Plaintiff and other police officers similarly situated, billed those separate and independent employers for this work, collected compensation due Plaintiff and other police officers similarly situated, and deducted any federal taxes or other deductions for Plaintiff and other police officers similarly situated, and disbursed money to Plaintiff and other police officers similarly situated. The work for separate and independent employers was not part of GMU's employment of Plaintiff and other police officers similarly situated. GMU paid Plaintiff and other police officers similarly situated less than the hourly rate of $25.00 per hour.

20. Plaintiff Craig Scott Dougall, on or about September and October, 1997, complained through his superiors and to the University's Equity Office, Margaret Howell, the authorized agent of the University charged with the responsibility to administer the University's personnel policies, about the University's failure to pay him wages he thought he was entitled to at that time and other issues related to safety, unequal application of general orders, promotions and lack of equipment. He discussed that he was not the only one who thought wages were due him and Dougall told her that the other officers and dispatchers had these same issues. After more than three months, Ms. Howell informed Plaintiff that wage issues must be handled through human resources. As to the other issues, Ms. Howell told Plaintiff to see Ellen Drewett, the University's authorized agent charged with the responsibility to advise employees as to determine

what was greivable, meaning whether his wage claims were greivable under the Virginia Personnel Act, Title 2.1 Chapter 10, § 2.1-110 *et seq.* of the Code of Virginia (1950), as amended, and/or The Department of Employee Relations Counselors, Title 2.1 Chapter 10.01 § 2.1-116.01 *et seq.* of the Code of Virginia (1950), as amended.

21. Ellen Drewett is the University's Employee Relations Manager authorized to determine issues under the Virginia Personnel Act, Title 2.1, Chapter 10, § 2.1-110 *et seq.* of the Code of Virginia (1950), as amended, and/or The Department of Employee Relations Counselors, Title 2.1, Chapter 10.01 § 2.1-116.01 *et seq.* of the Code of Virginia (1950), as amended. On or about January 21, 1998, Ms. Drewett met Plaintiff Dougall, who told her he was informing the other officers about these meetings and what advice he was given. He discussed the wages issues and other issues including issues related to safety, unequal application of general orders, promotions and lack of equipment. Ms. Drewett advised Plaintiff Dougall that wage issues were not greivable, meaning his claims were not greivable under the Virginia Personnel Act, Title 2.1, Chapter 10, § 2.1-110 *et seq.* of the Code of Virginia (1950) as amended, and/or The Department of Employee Relations Counselors, Title 2.1, Chapter 10.01, § 2.1-116.01 *et seq.* of the Code of Virginia (1950), as amended. She informed him no issues he raised were greivable because he and the other officers had not applied for promotion and the wage issues must be resolved by Human Resources. Ms. Drewett, upon Dougall saying to her that he would complain to the Department of Labor since pay is not greivable, replied that "you would lose your job if

you were to sue or bring legal action against a big corporation or firm."

22. As a result of being told that the matter was not greivable, Plaintiff Craig Scott Dougall and officer Karl Rodriguez sought and obtained legal advice concerning their rights. That counsel, made a written claim by letter to the head of GMU, Alan Merten, President of the University, on or about May 28, 1998. Attached Exhibit 2. That claim letter claimed compensation was due Plaintiff and other officers similarly situated for the violations of the Fair Labor Standards Act based on the University's failure to pay Plaintiff and the other officers similarly situated the rate agreed to between the University and Plaintiff and the other officers similarly situated. Plaintiff's counsel was contacted by the University's Vice President for Legal Affairs, who indicated he would be responsible for determining Plaintiff's claims. The University, by its authorized agents, paid some of the claimed compensation but through its authorized agents it denied the remaining claims of compensation. After denial of all claims for compensation by the University, Plaintiff and other officers filed suit in this Circuit Court.

Count I: Breach of Employment Contract

23. Plaintiff incorporates by reference Paragraphs 1 through 22, inclusively, as if fully set forth herein.

24. GMU breached the employment contract by not performing the material terms of the contract. GMU breached the contract by failing to fully compensate and/or under compensating Plaintiff for work performed for

GMU. The compensation due is wages and reimbursement for costs expended on GMU's behalf.

25. As a direct result of GMU's breach, Plaintiff was and continues to be damaged.

26. Plaintiff's and the other police officers' damages are wages and compensation from his employer under an agreement to pay him wages. Payment was to be made by legal tender of the United States.

WHEREFORE Plaintiff prays this Court to declare the terms of the relationship between Plaintiff and GMU, and for damages in excess of $15,000.00, costs, and reasonable attorney's fees.

Count II: Breach of Contract

27. Plaintiff incorporates by reference Paragraphs 1 through 29, inclusively, as if fully set forth herein.

28. GMU breach [sic] the separate contact [sic] with Plaintiff by not performing the material terms of the contract. GMU breached the separate contract by failing to compensate Plaintiff at the agreed upon rate for all hours Plaintiff worked.

29. As a direct result of GMU's breach, Plaintiff was and continues to be damaged.

WHEREFORE, Plaintiff prays this Court to declare the terms of the relationship between Plaintiff and GMU, and for damages in excess of $15,000.00 and costs.

Count III: Violation of Fair Labor Standards Act
[deleted per order of 8/26/99]

Count IV: Discrimination [deleted per order of 8/26/99]

Respectfully submitted,
CRAIG SCOTT DOUGALL
By counsel:

McGEEHAN & ASSOCIATES
10615 Judicial Drive, Suite 403
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(703) 273-5303
(703) 273-5307 (facsimile)

/s/ John P. McGeehan
John P. McGeehan,
Esq., VSB No. 9160

/s/ George A. Hawkins
George A. Hawkins,
Esq., VSB No. 40125

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent to Sydney E. Rab. Assistant Attorney General, Office of the Attorney General, 900 E. Main Street, Richmond, VA 23219, by overnight mail on the 16th day of September, 1999.

/s/ John P. McGeehan
John P. McGeehan

Plaintiff's Exhibit 1

List of Plaintiffs

Kevin Barrett	1/6/86 to present
Robert Brownell	12/2/90 to present
Matthew Brudvig	1/1/88 to present
David Clark	3/13/89 to present
Heather Connally	5/1/95 to present
Jimmy Davis	2/29/96 to present
Craig Dougall	8/28/95 to present
Thomas Green	8/5/96 to present
Jeffrey Green	4/1987 to present
Bruce Jackson	7/1/89 to present
Gilbert McAuliff	8/19/95 to present
Anthony Lamanna	8/14/97 to present
Judy Meade	4/15/92 to present
Willie Morton	1/1/87 to present
Brian Neeley	1/6/96 to present
Steven Picklesimer	8/5/96 to present
Joseph Pignatiello	2/1986 to present
Blanche Skar Cathcart	5/1/87 to present
Dennis Stewart	11/1986 to present
Stuart Strange	9/1/93 to present
James Van Doren	8/21/95 to present

Plaintiff's Exhibit 2

JOHN P. MCGEEHAN & ASSOCIATES, P.C.
Attorneys at law
Suite 403
10615 Judicial Drive
P.O. Box 1425
Fairfax, VA 22030-1425

Fax (703) 273-5307 (703) 273-5303 1-800-224-5303

May 28, 1998

Alan G. Merten
President
George Mason University
4400 University Drive
Fairfax, VA 22030-4444

RE: *Fair Labor Standards Act violations*

Dear President Merten:

Thirty (30) employees of the George Mason University Police/Department of Public Safety whose names are on the attached list hired me to assist them in recovering legal damages and attorneys' fees due for violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, as amended in 1985, U.S. Department of Labor regulations contained in 29 C.F.R., in particular Part 553 and FLSA case law, including *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) and its progeny. It is of utmost importance in this matter that **you emphasize with all University officers and employees that there will be no retaliation against these employees for asserting claims.**

My review has found that since last year GMU police officers complained to their supervisors about overtime pay and in January one or more of them filed a complaint with the U.S. Department of Labor (DOL). DOL accepted the complaints for investigation, but, due to its backlog of complaints, the investigation has not proceeded far. I will represent the police officers regarding the administrative complaint, working with the Department of Labor and representing them in court if necessary. The officers demand that they be paid all overtime pay they are due, the 100% liquidated damages provided in 29 U.S.C. § 216(b) and reasonable attorney's fees and costs as allowed by 29 U.S.C. § 216. I was told that in January 1998, George Mason University unilaterally agreed to pay overtime for pre-shift (roll call) time and did so on March 16. Two officers rejected the checks because they were fearful it could [sic] construed as a settlement. FLSA defines binding settlement and the payments are not binding settlements as defined by FLSA.

The overtime claims for work periods determined by FLSA § 7(k) and 29 C.F.R. § 553.230 pertain to the University's failure to calculate into work shifts "off the clock" work, including, but not limited to the fifteen minute pre-shift for the one year before the period the University has paid (i.e. a third year); preparation time for other than the roll call; meal periods during 8½ hour (Prince William and Arlington) shifts or 12 hour (Fairfax) shifts (which were ordered by Mr. Oglesby's memo on 8/7/97); the fifteen minutes post-shift time (per order of 7/13/96); travel time between the Fairfax and Arlington or Prince William campuses or the Northern Virginia Criminal Justice Academy; post-shift work maintaining equipment,

completing paperwork, receiving telephone calls from supervisors and investigators; some training time; and the time not paid when there was a school closings. [sic] My clients' position is that the University's conduct was willful or reckless within the law's meaning, in particular the acts of Acting Director/Chief John D. Jenkins, Associate Vice-President of Operational Service, Stanley Taylor, Assistant Vice-President-Human Resources, Keith Bushey, and Linda Westphal, Director, Human Resources. For that reason, their claims revert back three (3) years – not two. The University's letter informing the employees of a right to pre-shift payment was misleading in failing to tell the employees there also was a three year period for which they could be paid.

The liquidated damages is for the compensation paid in March and all unpaid overtime pay. Statements made by Interim Director John D. Jenkins and statements made to police supervisors will establish there were no reasonable grounds for believing these were not violations. In fact, the University's labor-management courses cover FLSA. Finally, some supervisors indicated the department simply tried to get away with it as long as it could.

The most serious accusation is intimidation and retaliation. For example, Officer Dougall was removed as a Field Training Officer, a career enhancing position, following the DOL complaint. Officer Dougal [sic] also was required to appear for a questioning by Interim Director Jenkins, which violates the spirit and, perhaps, the terms of the Law-Enforcement Officers' Procedural Guarantees, Virginia Code § 2.1-116.1 *et seq.*. The most symbolically petty retaliation is that officers now must punch a time clock and complete time sheets because of the complaint.

Please ask the appropriate University official or Assistant Attorney General who handles the University's employment issues to contact me to discuss resolving these matters subject to DOL review. I was told there is a meeting on this complaint in early June, so I ask for a reply before that meeting or within seven (7) days, whichever is sooner.

Sincerely yours,

/s/ John P. McGeehan
John P. McGeehan

JPMc/dg
Enclosure: List

cc: All clients
Mr. Koran, U.S. Department of Labor

C:\clients\GMUFLSA\Notification letter to Merton.wpd

Supreme Court, U.S.
FILED
NOV 3 2000
CLERK

(4)

No. 00-349

IN THE

SUPREME COURT OF THE UNITED STATES

CRAIG SCOTT DOUGALL, *et al.*,

Petitioners,

v.

THE RECTOR AND VISITORS OF
GEORGE MASON UNIVERSITY
and
THE COMMONWEALTH OF VIRGINIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

PETITIONER'S REPLY BRIEF

JOHN P. MCGEEHAN
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GEORGE A. HAWKINS
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ADDITIONAL QUESTION PRESENTED

1. Can the Commonwealth of Virginia assert lack of jurisdiction in this Court when her prior assertion was denied by Virginia's trial court, the Commonwealth never excepted from that ruling, and never appealed that ruling in Virginia's trial and appellate courts?

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TABLE OF AUTHORITIES

Federal Cases:

Alden v. Maine, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) 1-2

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed. 1016 (1985) 1

National League of Cities v. Usury, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) 1

State Cases:

Commonwealth v. Luzik, 259 Va. 198, 524 S.E.2d 871 (2000) 2

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Federal Statutes:

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State Statutes:

Va. Code §2.1-116.06.C 3

Va. Code §2.1-116.06.D 3

Va. Code §2.1-116.07 3

Va. Code §8.01-192 . . . . . 2, 3

PETITIONER'S REPLY BRIEF

The Respondents raise that the alleged failure of the Petitioners to add as party-defendant the Comptroller of Virginia denies this Court jurisdiction. Respondents' argument is untrue. This argument was raised first in the trial court by their demurrer, Appendix H, *infra,* A-2, A-3 (Ground 1 to Count I and Ground 1 to Count II) and the trial court overruled that demurrer. Appendix G, p. 66a and 67a. After the trial court's decision, which was not excepted to by the counsel for the defendants,[1] the Respondents have appealed that ruling. It is now the law of the case and there is no defect in this case based on Respondents' allegation.

Moreover, the Respondents fail to recognize that their obligation to pay Petitioners these wages is not created by the Fair Labor Standards Act, 29 U.S.C. §209, *et seq.* (hereinafter "FLSA") but by express and implied contractual obligations created by Respondents' past statements and practices continuing to the present time. Their practice existed after this Court's decision in *National League of Cities v. Usury,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) and before *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), which confirmed the imposition of the FLSA on states and its instrumentalities. See App. G, pp. 38a-39a. Thus, the source of the right to overtime is created by prior agreements and practices by the Respondents. That right is reinforced by the FLSA which, until this Court's ruling in *Alden v. Maine,* 527 U.S. 706, 119

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[1] *E.g.,* compare Petitioners' counsel's signature with Respondents' counsel's signature, Appendix B to Petition for Certiorari.

S.Ct. 2240, 144 L.Ed.2d 636 (1999), provided direct redress for individuals to courts and additional remedies for failure to pay overtime. Indeed, the FLSA may supplant contrary state interpretation of such terms as "work" when overtime compensation is claimed, but the claim of overtime exists independently of the FLSA as part of the contract for employment between the Petitioners and the Respondent. The right to get paid for these wages is not just a unilateral expectation, but, as the facts will show and as pled by the Petitioners, a contractual right based on established practice and agreement.

The Respondents claim *Commonwealth v. Luzik*, 259 Va. 198, 524 S.E.2d 871 (2000) "directly addressed the issue" of state immunity on contractual claims against it. However, the opposite is true. The Virginia Supreme Court denied the claims of probation officers because, in part, they did not present their claims "in the style of a contract claim or in the manner prescribed for such claims by the statutory scheme and case law they cite for their proposition." *Id.*, 259 Va. at 207, 524 S.E.2d at 877. By this language, *Luzik* provided for Petitioners' claims brought pursuant to contract actions as the Motions for Judgment in these cases are styled as contract claims. See p. 12 and p. 13 to Appendix to Brief in Opposition ("Count I: Breach of Employment Contract" and "Count II: Breach of Contract"). The *Luzik* court reasoned that the probationers did not utilize the waiver of sovereign immunity found in Va. Code §8.01-192. *Id.*, 259 Va. at 207, 524 S.E.2d at 877 but the Petitioners did utilize that procedure and argued in the courts below on that basis. The Respondents now rely on the *dicta* that followed this reasoning which stated section Va. Code §8.01-192 was a specific waiver of immunity ("We will assume, without deciding"). *Luzik*, 259 Va. at 207, 524 S.E.2d at 877. However,

holdings in prior Virginia Supreme Court decisions such as *Wiecking v. Allied Medical Supply*, 239 Va. 548, 391 S.E.2d 259 (1990), state Va. Code §8.01-192 is a general waiver. *Id.*, 239 Va. at 552-3, 391 S.E.2d at 261. Indeed, the statute and its predecessors read as a general waiver since at least 1778. *Id.*

Respondents argue that Petitioners' claims are moot because the process now "urged" on the state agency by the Virginia Attorney General includes FLSA matters in grievances so "there is absolutely no reason" the Respondents' denial of due process in the past should be reviewed by this Court. This argument denies redress for past violations by mere promises of future and partial correction. These are the same Respondents who claimed at every level that Petitioners cannot grieve this deprivation. See, e.g., App. 11 through 12, Brief in Opposition.

The Respondents mislead the Court by splicing different statutory sections together. Brief in Opposition at 15. It is true that issues of grievability are subject to judicial review, but that review is limited to just that topic, Va. Code §2.1-116.06.D, and it is true that the "substance of a grievance is submitted for a full hearing" before a hearing officer. Va. Code §2.1-116.07. However, issues concerning wages are not subject to that full hearing before a hearing officer. Va. Code §2.1-116.06.C. It is precisely because wage issues are not subject to review by a neutral decision maker that Respondents have violated Petitioners' due process rights.

Respondents mislead the Court when their Statement of Jurisdiction claims that due process was not raised in the court below. Preliminarily, it is important to recognize the procedural posture of this case. The Amended

Motions for Judgment claim breaches of contract, the Respondents answered stating those breaches are precluded by the Virginia Personnel Act and then the Petitioners claimed that should the Virginia Personnel Act be interpreted to preclude judicial review under state law, that state law interpretation violated Petitioners' due process rights. This posture is recognized by this Court in granting due process protection. See Petition for Writ of Certiorari at 9. Moreover, Petitioners relied on the due process reasoning of a prior Virginia Supreme Court decision for the waiver of immunity expressed in *Wiecking, supra,* and this argument was recognized by the Respondents. Appendix G, Petition for Certiorari, at 57a, 58a, and 60a. Further, this issue was preserved as an anticipated reply to Respondents' argument in its brief before the Virginia Supreme Court. Appendix I, *infra.*

CONCLUSION

There is no jurisdictional defect which could deny Petitioners' requested relief. The unilateral action by Respondents to cure their past denials of due process for future grievants does not moot Petitioners' claims. Rather, by changing its practices, Respondents admit that their past practices precluded Petitioners' claims under Virginia's personnel laws. The failure to provide any due process protection to Petitioners when Respondents took their earned wages should be redressed by this Court and the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN P. MC GEEHAN

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APPENDIX H

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE COUNTY OF FAIRFAX

Law. No. L178905

CRAIG SCOTT DOUGALL and other current police officers similarly situated,

Plaintiffs,

v.

THE RECTOR AND VISITORS OF GEORGE MASON UNIVERSITY,

and

COMMONWEALTH OF VIRGINIA, et al.,

Defendants.

DEFENDANTS' DEMURRER AND PLEAS TO THE AMENDED MOTION FOR JUDGMENT

The Rectors and Visitors of the George Mason University ("GMU"), and the Commonwealth of Virginia, by and through the Attorney General of Virginia, as counsel, submit the following Grounds for Demurrer, and Pleas of Sovereign Immunity, the Statute of Frauds, and Improper Joinder and Defendants' Motion to Strike. Responses are listed with the Counts designated in the Amended Motion for Judgment filed September 16, 1999.

Count I – Breach of Employment Contract

GROUNDS FOR DEMURRER

1. The plaintiffs have failed to present this claim to the Comptroller of Virginia, pursuant to Code of Va. 2.1-223.1 and 8.01-192, *et seq.*, the claim has not been disallowed as required by law, and the Comptroller has not been made a party defendant as required by statute.

2. The Virginia Personnel Act is the exclusive remedy for such claims by the plaintiffs, as they are claims of state employees.

3. The plaintiffs fail to state a cause of action for breach of an employment contract, inasmuch as they fail to state:

   a) when the alleged contract was made;

   b) essential terms of the contract, including the amount of the agreed wage ("hourly rate");

   c) which of the material terms of the contract were breached;

   d) how the material terms of the contract were breached;

   e) when such terms were breached; and

   f) the resulting damages.

4. Plaintiffs fail to allege a contract which required the defendants to pay for time worked prior to the work day, time worked after the work day, "roll call", work at home, the 15 minute period before roll call, the 1.5 hours per week attending the police academy, the 15 minutes after the conclusion of a shift, mileage expenses, lunch periods, and other discreeet periods of time, and charges.

PLEAS

5. The action against the Commonwealth of Virginia and GMU (the Rector and Visitors in their official capacity) is barred by the doctrine of state sovereign immunity, the Eleventh Amendment to the United States Constitution, and the Tenth Amendment to the United States Constitution.

6. The Statute of Frauds bars the claim, Code 11-2.

7. The plaintiffs are improperly joined as parties plaintiff, having distinct claims.

8. This claim is prohibited because the Court is asked to enforce an illegal collective bargaining contract. See Code §40.1-57.2.

Count II – Breach of Contract

GROUNDS FOR DEMURRER

1. The plaintiffs have failed to present this claim to the Comptroller of Virginia, pursuant to Code of Va. 2.1-223.1 and 8.01-192, *et seq.*, the claim has not been disallowed as required by law, and the Comptroller has not been made a party defendant as required by statute.

2. The Virginia Personnel Act is the exclusive remedy for such claims by the plaintiffs, as they are claims of state employees.

3. The plaintiffs fail to state a cause of action for breach of contract, inasmuch as they fail to state:

   a) when the separate contract was made;

   b) the essential and material terms of the separate contract;

c) the nature of the breach alleged;

d) when the breach occurred; and

e) the damages resulting from the breach alleged.

PLEAS

4. The action against the Commonwealth of Virginia and GMU (the Rector and Visitors in their official capacity) is barred by the doctrine of state sovereign immunity, the Eleventh Amendment to the United States Constitution, and the Tenth Amendment to the United States Constitution.

5. The Statute of Frauds bars the claim, Code 11-2.

6. The plaintiffs are improperly joined as parties plaintiff, having distinct claims.

7. The clam is unenforceable as based upon an illegal contract. Va. Code 40.1-57.2.

MOTION TO STRIKE

1. The Court's prior rulings preclude plaintiffs from pursuing an action under the Fair Labor Standards Act and hence defendants move to strike Paragraphs 12, 14, 15, 16 and 18 from the Amended Motion for Judgment, as surplusage.

2. The Court's prior rulings and the absence of an express agreement or statutory provision, preclude an award of "reasonable attorney's fees" as sought in Count I.

3. The Amended Motion for Judgment fails to provide the defendants with fair and reasonable notice as

to the amount claimed by the plaintiffs, denying due process of law.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
THE RECTOR AND VISITORS OF
GEORGE MASON UNIVERSITY

By: /s/ Sydney E. Rab
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MEMORANDUM

The Defendants have not noticed for a hearing the foregoing Demurrer, etc. The authorities in support of the pleading will be set out in a supplemental Memorandum which will be filed when the matter is noticed for a hearing.

By: /s/ Sydney E. Rab
Sydney E. Rab
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Demurrer, etc. was faxed, and mailed, first-class, postage prepaid, this 21st day of September, 1999, to John P. McGeehan, Esquire, and George A. Hawkins, Esquire, of McGeehan & Associates, 10615 Judicial Drive, Suite 403, Fairfax, Virginia, 22030.

/s/ Sydney E. Rab
Sydney E. Rab
Assistant Attorney General

APPENDIX I

EXCERPT FROM PETITIONER'S PETITION FOR WRIT FROM SUPREME COURT OF VIRGINIA

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E. To Preclude Judicial Review Deprives the Police Officers of their Property without Due Process

The Police Officers seek judicial review of their contract claims. The University attacked the Police Officers' claims by interposing a demurrer arguing that the VPA is an exclusive remedy. In reply to that demurrer, the Police Officer's asserted that the University's position would impose an unconstitutional taking. The Police Officers' claim is not one of a taking, but of breach of contract, a claim considered well-pled by the court below. Order overruling demurrer, 12/9/99. Thus, the issue of constitutional taking is not raised by direct claim; rather, the issue is raised as a reply to the demurrer raised by the University.[23]

First, there is no clearly established bar in the personnel laws to constitutional claims. *Johnson v. Robinson,* 415 U.S. 361, 367, 94 S.Ct. 1160, 1165 (1974). "Serious constitutional questions" arise when an act is construed to bar judicial review of constitutional claims. *Johnson v. Robinson,* 415 U.S. 361-366-367, 94 S.Ct. 1160, 1165-1166 (1974). The only dismissal is when the constitutional claim is "essentially fictitious", "obviously frivolous" and "obviously without merit." *Hagans v.*

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[23] As a reply, the issue is not one to be raised by amendment to the Motion for Judgment. See Footnote 12, *supra,* and accompanying text.

Levine, 415 U.S. 528, 537, 94 S.Ct. 1372, 1379 (1974); *Buchanen v. City of Chesapeake,* 237 Va. 50, 53, 375 S.E.2d 736 (1989) (Apparently applying the this standard). There is no doubt that the Police Officers' claims have merit, due to the amount sought and because their cause of action is well-pled. Even if a statute such as the VPA could preclude ordinary review, such preclusion must give way when constitutional issues when such issues are involved. *Webster v. Doe,* 486 U.S. 592, 603, 108 S.Ct. 2047, 2053 (1988); *Bowen v. Michigan Academy of Family,* 476 U.S. 667, 670-673, 106 S.Ct. 2133, 2135-2137 (1986). These issues were raised through the defense of precluded judicial review. *Webster, supra* at 2050; *Bowen, supra,* at 2135, not as a part of the complainant's case. *See also City of Amarillo v. Hancock,* 239 S.W.2d 788, 790 (1951) (City personnel ordinance which barred judicial review does not bar such review when constitutional issues involved).

In summary, this Court cannot deprive the circuit's review of the Police Officers' contract claims. To deny them judicial review would permit the Commonwealth's agenty to take labor without compensation.

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